(4)

No. 04-421

Supreme Court, U.S.
FILED
OCT 27 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CLUB CAR (QUEBEC) IMPORT, INC.
and MARTIN MURPHY,

Petitioners,

v.

CLUB CAR, INC.;
PIERRE CHAMPIGNY; and
ÉQUIPEMENTS PIERRE CHAMPIGNY, LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE RESPONDENT CLUB CAR, INC. IN OPPOSITION

JAMES B. ELLINGTON*
THOMAS L. CATHEY
HULL, TOWILL, NORMAN,
BARRETT & SALLEY, P.C.
P.O. Box 1564
Augusta, GA 30903-1564
(706) 722-4481

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

RULE 29.6 STATEMENT

Respondent Club Car, Inc. has the following parent corporations:

Clark Equipment Company, parent corporation of Club Car, Inc.;

Ingersoll-Rand Company, parent corporation of Clark Equipment Company;

Ingersoll-Rand (Barbados) Holding, Incorporated, parent corporation of Ingersoll-Rand Company;

Ingersoll-Rand Global Holding Company, Limited, parent corporation of Ingersoll-Rand (Barbados) Holding, Incorporated;

Ingersoll-Rand Company, Limited, parent corporation of Ingersoll-Rand Global Holding Company, Limited.

No publicly held company owns 10% or more of Club Car, Inc.'s stock.

TABLE OF CONTENTS

	Page
RULE 29.6 STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT	1
REASONS FOR DENYING THE PETITION	11
I. THE PETITIONERS DID NOT COMPLY WITH SUPREME COURT RULE 29.3	11
II. THERE WAS NO *EX PARTE* COMMUNICATION BETWEEN THE RESPONDENTS AND THE DISTRICT COURT	12
III. NONE OF THE ARGUMENTS ADVANCED BY THE PETITIONERS SHOW THAT CERTIORARI IS APPROPRIATE IN THIS CASE	14
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

Allison v. McGhan Medical Corp., 184 F.3d 1300 (11th Cir. 1999) 19

Bazemore v. Friday, 478 U.S. 400 (1986) 17, 18

Club Car, Inc. v. Club Car (Quebec) Import, Inc., 362 F.3d 775 (11th Cir. 2004), *reh'g and reh'g en banc denied*, ___ F.3d ___ (11th Cir. June 29, 2004) 13, 16, 17, 20, 21

Complete Concepts, Ltd. v. General Handbag Corp., 880 F.2d 382 (11th Cir. 1989) 16

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) ..... *passim*

General Electric Co. v. Joiner, 522 U.S. 136 (1997) ..... *passim*

Goebel v. Denver & Rio Grande Western R.R., 215 F.3d 1083 (10th Cir. 2000) 21

Kumho Tire, Inc. v. Carmichael, 526 U.S. 137 (1999) ..... *passim*

Shaw v. Ruiz, 207 Ga. App. 299, 428 S.E.2d 98 (1993) 16

Weisgram v. Marley Co., 528 U.S. 440 (2000) 24

STATUTES AND REGULATIONS

Federal Rule of Evidence 702 16

BRIEF FOR THE RESPONDENT IN OPPOSITION

The petitioners concede that this case does not present a "difficult, close or intellectually challenging question." Pet. at 22. They do not allege that the Opinion below conflicts with the decision of any other court or that an important question of federal law remains unsettled. Instead, they merely assert that the District Court abused the ample discretion allotted to it by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire, Inc. v. Carmichael*, 526 U.S. 137 (1999). Their argument is only that the courts below based their decisions on erroneous factual findings and misapplied the rule set out in *Daubert*. This issue was fully briefed and argued to the Eleventh Circuit Court of Appeals, which properly followed this Court's guidelines in its Opinion. The petitioners ask for further review of a well-settled issue of law and have not provided sufficient reason for this Court to consider this run-of-the-mill collection case.

STATEMENT

Respondent Club Car, Inc. ("Club Car") manufactures and sells golf cars and golf car parts. Petitioner Club Car (Quebec) Import, Inc. ("CCQ")[1] served as Club Car's

[1] Martin Murphy is president and majority shareholder of CCQ. Although Murphy appears as a petitioner, he did not bring any counterclaims during the proceedings below and had no claims for damages against the respondents. Because the only error enumerated in the Petition involves the exclusion of expert testimony on the issue of

(Continued on following page)

distributor in Quebec from the early 1980's until 2000 when Club Car chose respondent Équipements Pierre Champigny, Ltd. ("EPC") to be its distributor. At that time, CCQ owed Club Car approximately $1.5 million (Canadian) for goods it had received from Club Car for which it had not paid. Record 34-449-63. CCQ never paid what it owed. *Id.* Consequently, Club Car filed suit against CCQ and Murphy on August 29, 2000 to recover the money it was owed, which prompted CCQ to file counterclaims against Club Car, EPC and the president of EPC, respondent Pierre Champigny. CCQ first filed a 60-paragraph, 13-count Counterclaim, followed by a 167-paragraph, 29-count Second Counterclaim. Record 3-44; Record 7-65. Ultimately, it filed an Amended Counterclaim Complaint containing 323 paragraphs and 80 counts. Record 9-117. The parties engaged in an extended period of briefing and discovery, and the case was eventually set for trial in early 2003.

One week before trial, CCQ filed a Motion to Amend the Pretrial Order, which reduced its 80-count Amended Counterclaim Complaint to just seven counterclaims. Record 24-337. One of these was dismissed at the pre-trial conference, leaving CCQ with six counterclaims total, only four of which applied to Club Car: breach of contract, conspiracy to breach a contract, breach of fiduciary duty and promissory estoppel. Pet. 4.

Trial of the case began on February 10, 2003 and lasted five days. Although CCQ had denied any liability to Club Car in its Answer and throughout discovery, it

---

damages, Murphy is not properly a party to this appeal, and all proceedings against him in the United States are now final.

conceded at trial that it owed Club Car at least $1,437,544 (Canadian) for unpaid goods. Record 38-451-233. At the close of Club Car's evidence, CCQ proceeded to present its counterclaims to the jury. It contended that its distributor agreement with Club Car prevented Club Car from selling product directly to independent dealers who were not Club Car distributors. Record 39-452-241-42. Club Car responded that its contract with CCQ was nonexclusive. Record 39-452-229. CCQ also alleged that Club Car employees had reached an illicit agreement with respondent Champigny to replace CCQ as Club Car's distributor. Champigny and the Club Car employees denied the existence of such an agreement. Record 37-450-246-47; Record 38-451-56. CCQ presented evidence related to its counterclaims for promissory estoppel and breach of fiduciary duty. It then called Peter Ryan to give expert testimony regarding its alleged damages. App. 1-103.[2]

Ryan had filed a "Preliminary Report" on April 22, 2002, which stated that CCQ had sustained $2,728,583 (Canadian) in damages. Depo. of Peter Ryan 6/03/02, 51-52 and Depo. Exh. 215. Club Car then deposed Ryan in Canada on May 9, 2002. He walked out of the deposition after three hours. Depo. of Peter Ryan 5/09/02 at 124-25, 127. Club Car eventually returned to Canada to complete

---

[2] CCQ includes excerpts of Ryan's testimony in the Appendix to its Petition. However, these excerpts are so incomplete that they are misleading. They omit crucial portions of Ryan's testimony and important rulings by the District Court. For instance, CCQ omits the District Court's decision not to exclude Ryan based on his qualifications and its jury instruction regarding Ryan's testimony. For this reason, Club Car has attached as its own Appendix all of Ryan's trial testimony and the entirety of the District Court's trial hearing on that testimony. Throughout this Brief, Club Car's Appendix is cited as "App.," and CCQ's Appendix is cited as "Pet. App."

the deposition a month later on June 6, 2002. EPC and Champigny never had the opportunity to depose Ryan because they had not yet filed their responsive pleadings when Ryan was deposed. On July 11, 2002, a month after Ryan's deposition was completed, CCQ submitted a "Revised Preliminary Report of Peter Ryan" increasing his damages estimate to $9,087,399 (Canadian). After discovery closed, Ryan produced a third report which calculated CCQ's alleged damages at $10,464,176 (Canadian). Record 39-345-33. At trial, Ryan attempted to revise his opinion for a fourth time and present yet another damages figure. App. 27.

Ryan has been a close friend of petitioner Murphy for more than 35 years. App. 57. In fact, they are the best of friends. App. 59. He is the godfather of Murphy's daughter, and he and Murphy are golfing and curling buddies. App. 57-58. Ryan has vacationed with Murphy in Europe, Cape Cod, Las Vegas and Canada's Laurentian Mountains. App. 58. He served as CCQ's "litigation advisor" and gave Murphy advice on legal documents related to the lawsuit. App. 59, 64. He also served as a financial and business advisor regarding CCQ's transferring its assets to another corporation after Club Car filed this suit against CCQ. App. 62-63. Before the case began, Ryan attended several meetings between Murphy and representatives of Club Car. App. 59-60. In addition to his expert testimony, he gave factual testimony at trial regarding these meetings.

At the commencement of Ryan's testimony, the respondents objected that he was unqualified to offer opinion testimony regarding CCQ's alleged damages. App. 12. The respondents urged the District Court to exercise its gatekeeper function and exclude Ryan's testimony. App. 3.

The District Court then permitted counsel for EPC and Champigny to *voir dire* Ryan regarding his qualifications. App. 7-12.

Ryan testified that he had worked in accounting from 1966 to 1971 and became a chartered accountant in 1970. App. 5. However, he had not worked as a full-time chartered accountant for twenty years. App. 10. From 1981 to 1994, he worked in the film industry, supervising or dealing with production partners on such films as "A Savage Place," "Judas Goat" and "Prom Night III." App. 65-66. Since 1994, he had worked as a consultant. Ryan had never published anything in his purported area of expertise. App. 7. He had never testified as an expert before and had never done a study of economic damages in a business loss case before. App. 9. This was his first experience with such an exercise. *Id.*

CCQ was also given a chance to explore Ryan's qualifications. App. 4-6. The District Court then heard arguments outside the presence of the jury on the propriety of Ryan testifying. App. 13-15. In the Petition, CCQ claims that Ryan was not permitted to testify because he had never served as an expert before. Pet. 21. This allegation is simply not true. In fact, the District Court allowed Ryan to testify despite his marginal qualifications and lack of experience. Club Car, EPC and Champigny all objected to Ryan as unqualified, but the District Court held, "I am going to let him testify over your objection." App. 14.

Ryan testified that CCQ had suffered damages classified in eight separate categories. App. 22. Although CCQ now contends that no future damages were argued to the jury, Ryan's testimony specifically described damages for

lost golf car sales and golf car parts sales for the years 2002 to 2005. *Id.* On cross-examination Ryan reiterated that his calculations included future damages:

> Q: Now in your summary and conclusion there in your report, you are calculating damages three, four, five years into the future, aren't you?
>
> A: Yes.

App. 79. Moreover, in its closing argument, CCQ returned to the issue of future damages:

> There are two claims that Club Car (Quebec) has in this case. There are two sets of claims. And the claims really have a dividing line in the year 2000. There are a series of events that occur before the year 2000, and there are a series of events that occur after 2000.

App. 114. CCQ sought future lost profits as its damages for the events arising after 2000, when its distributor relationship with Club Car ended.

Although CCQ's net income for the years 1992 to 1999 *combined* totaled only $193,037 (Canadian), it was Ryan's opinion that CCQ had suffered damages in the form of lost profits and sales amounting to $10,464,176. App. 77-78. Ryan admitted that some of his extrapolations were based upon "gut instinct." App. 72-73. Some of his figures were "a shot in the dark." App. 73. Moreover, during direct examination, Ryan testified that his lost profit calculations were based on gross sales and gross profit numbers and did not account for expenses. For instance, he calculated lost profits on the sale of one-year old golf cars by applying a "gross margin on the sale of one year old cars" to an estimate of the number of cars he felt CCQ should have

sold. App. 28. He also calculated lost profits for sales of packages of golf car parts using a gross profit margin. He testified, "I calculated the cost of these parts by reference to the pricing manual from Club Car, and then applied the gross profit on a per package basis to the number of packages that I previously calculated." App. 29. On cross-examination, Ryan again admitted to using gross profit figures:

> Q: Mr. Ryan, the numbers you have already given the jury and the eight items you talked about are all gross sales and gross profit numbers, weren't they sir?
>
> A: Yes.
>
> Q: They did not consider that the business, in generating those sales and in generating those profits, would have any expenses whatsoever, did they, sir?
>
> A: No.

App. 83. For example, Ryan assumed that CCQ had lost $5 million in sales on new golf cars and that the entire value of those sales would have been booked as profits to CCQ's bank account. App. 84. He assumed that these extra sales would be generated without a corresponding increase in sales force and did not account for any overhead expenses related to those sales. *Id.*

> Q: [The business] is going to put that $5 million directly into its pocket or its bank account without having to account for any expenses related to that $5 million; isn't that right?
>
> A: That's what's in my report, yes.

Id.

Ryan then agreed that lost earnings should be measured net of cost. App. 87. He admitted that, in the real world, increased sales would come only with incremental and administrative costs. App. 88. CCQ's annual financial statements were entered into evidence, and Ryan admitted that the figures in those statements were arrived at by applying generally accepted accounting principles. App. 50-51. Those statements take into account a number of "operating expenses" including: delivery costs, depreciation, interest, salaries, taxes, telephone services and travel. Club Car's Trial Exh. 108, p. 4. Ryan's damages testimony did not account for any such expenses.

Ryan also conceded that he had not subtracted from his calculations revenue that CCQ would have generated despite any deleterious actions by Club Car and EPC. App. 96. He merely calculated CCQ's gross profit. App. 87. Nor did he discount his future damages calculations to present value. App. 86.

CCQ contends that Ryan testified that any incremental expenses would be insignificant and that he explained his failure to account for expenses in his lost profits calculations. Pet. 7. This is not the case. The transcript citations provided by CCQ involve Ryan's testimony about CCQ's value should it be sold to EPC, not any calculation of lost profits. Pet. App. 119a; App. 46-47. Ryan testified that in a sale of the business "the amount of incremental administrative expenses would be minimal." Pet. App. 122a; App. 96-97. This statement is unrelated to his prior testimony that increased product sales would be accompanied by increased costs.

After Ryan testified on direct examination, he was cross-examined by counsel for Club Car and counsel for

EPC and Champigny. App. 57-94. CCQ then had the opportunity to rehabilitate Ryan's testimony on redirect examination. App. 94-102. The respondents then renewed their objection to Ryan's damages testimony. App. 102. The District Court deferred the issue until the close of all evidence, at which time it convened a hearing to consider Ryan's testimony. App. 104-112.

The respondents' objection was based primarily on the fact that Ryan's testimony included only gross profits and gross sales figures. App. 104. The District Court gave CCQ an opportunity to respond to the objection, asking, "What do you say to that? What is the value of his testimony when he does not take into consideration the costs?" *Id.* It noted that Ryan "clearly said that he did not take into consideration the expenses in making his or giving his opinion as to what was lost." *Id.* When counsel for CCQ pointed out that no counter expert had testified to denigrate Ryan's opinion, the District Court responded, "He did it himself." App. 106. The District Court also stated that it was a matter of "sheer common sense" that Ryan should have accounted for costs when calculating lost profits. App. 105. After hearing arguments from all parties on the issue, the District Court eventually determined that Ryan had destroyed the validity of his opinion "by his own testimony." App. 109.

CCQ has represented to this Court that the District Court "struck Ryan's expert opinion evidence on damages *in its entirety*." Pet. 13 (emphasis in original). In reality, the District Court's ruling was much narrower. The District Court instructed the jury as follows:

> Members of the jury, with respect to Mr. Ryan's testimony as to damages, when he says that he

> did not take into consideration the expenses involved and merely used the gross amount, his opinion as to the loss on the defendant's counterclaim is stricken. You are not to consider that.

App. 113. The instruction clearly excludes only "Ryan's testimony as to damages, when he says that he did not take into consideration the expenses involved." The jury remained free to consider any of Ryan's damages figures that were properly calculated.

The jury deliberated from 11:15 a.m. until 8:53 p.m. on February 14, 2003. Record 41-453-61, 68. In its verdict the jury awarded Club Car $1,557,360 (Canadian) against CCQ and Murphy. Pet. App. 80a. It awarded CCQ $100,000 (Canadian) on its counterclaims against Club Car and nothing on its counterclaims against EPC and Champigny. Pet. App. 81a.

The petitioners then filed a "Motion for Judgment as a Matter of Law," a "Combined Rule 50 and 59 Motion" and a "Memorandum in Support of Motions Under Rule 50 and 59." Record 29-434; Record 29-435; Record 29-436. The District Court held a hearing to consider these post-trial motions on March 12, 2003. Record 42-461. The issue of Ryan's testimony was discussed at length during the hearing.

The District Court then entered an Order denying the petitioners' post-trial motions. Pet. App. 17a-79a. Although the bulk of the Order was devoted to other issues raised post-trial by the petitioners, it also addressed Ryan's testimony at some length. Pet. App. 52a-58a. The District Court noted that Ryan's final damages figure and the damage totals combined to reach that figure were biased by Ryan's failure to include incremental costs incurred in

generating revenue, as well as his failure to discount the figures to present value. Pet. App. 54a. It then elaborated on its trial ruling:

> The Court determined from the evidence before it that Ryan's procedures for calculating CCQ's past and projected future profit margins were insufficient according to rudimentary accounting standards, and that his testimony regarding such margins would only serve to confuse the jury. The Court did not need the aid of an opposing expert to recognize the deceptive nature of Ryan's methodology and its lack of conformity with generally accepted accounting principles. Indeed, as the Court expressed at trial, it is a matter of "common sense" that a party's profit margin will be affected by such things as incremental costs and that a party's damages should be reduced by revenue it would generate regardless of an opposing party's fault and adjusted for inflation.

Pet. App. 57a-58a. The District Court explained that Ryan's testimony was excluded because it was misleading and departed from traditional norms of calculating damages. Pet. App. 58a.

REASONS FOR DENYING THE PETITION

I. THE PETITIONERS DID NOT COMPLY WITH SUPREME COURT RULE 29.3.

This Court's Rule 29.3 requires the petitioners to serve their Petition on the respondents "at or before the time of filing." The Petition was filed with this Court on September 27, 2004, and the petitioners' Certificate of Service indicates that the Petition was served on September 27, 2004.

App. 115-116. However, the envelope received by respondent Club Car one week later containing its service copies of the Petition was not postmarked until September 29, 2004, two days after the Petition was filed. App. 117. Because the Petition was not postmarked "at or before the time of filing," respondent Club Car was not properly served in accordance with Rule 29.3. For this reason, the Petition for Certiorari should be denied.

II. THERE WAS NO *EX PARTE* COMMUNICATION BETWEEN THE RESPONDENTS AND THE DISTRICT COURT.

In the Petition, CCQ charges that the respondents engaged in an *ex parte* communication with the District Court. Pet. 13. This allegation is untrue, and Club Car strongly denies engaging in *ex parte* communications or any other unethical behavior at any time. Indeed, the activity CCQ inaccurately characterizes as an *ex parte* communication and attributes to Club Car was not undertaken by Club Car, but by EPC and Champigny. In any event, the activity was completely ethical and not *ex parte* in nature.

Before the District Court heard argument on the admissibility of Ryan's testimony, counsel for EPC and Champigny placed a photocopied page from the Federal Reference Manual on Scientific Evidence on Club Car's and CCQ's counsel tables. He also handed a copy of the document to the Clerk. He later made reference to the document during the hearing. This was not an *ex parte* communication, but merely a routine submission of authority to the District Court that was in no way improper. The District Court addressed the issue, among others, at a post-trial hearing held March 12, 2003. At that time, counsel for EPC and Champigny stated that he had

submitted copies of the document to the Clerk, to Club Car and to CCQ. Record 42-461-17. Counsel for Club Car affirmed that he had seen the document placed on CCQ's counsel table. Record 42-461-23. Counsel for CCQ accepted these statements, and the issue was closed. Record 42-461-18.

Moreover, the document formed no basis for the District Court's *Daubert* ruling. At trial, the District Court made it clear that it had not considered the document.

> MR. PENN [Counsel for CCQ]: If I may say something? This is the first time we have seen this document, and I want to let you know and put it on the record that this was misrepresented by Mr. Purcell. It does not say what he says it did. It's from a reference guide.
>
> THE COURT: I cannot help that. *I have not read it.*

App. 113 (emphasis added). The District Court reiterated that it had "never looked at or considered the document" in its Order of May 14, 2003. Pet. App. 62a. Although CCQ neglects to mention this fact in its Petition, the Court of Appeals considered it in its Opinion. "The excerpt was not 'evidence' but legal authority in support of EPC's argument. Moreover, the trial court indicated it had not even seen the excerpt when it made its ruling." *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775, 781 (11th Cir. 2004), *reh'g and reh'g en banc denied*, ___ F.3d ___ (11th Cir. June 29, 2004). CCQ can demonstrate no error and is not entitled to further review of this issue.

III. NONE OF THE ARGUMENTS ADVANCED BY THE PETITIONERS SHOW THAT CERTIORARI IS APPROPRIATE IN THIS CASE.

All the Petition seeks is a ruling from this Court that the District Court abused its discretion – nothing more. Pet. 22. CCQ does not argue that the District Court or the Court of Appeals applied the wrong rule of law in the proceedings below. It does not argue that the Opinion of the Court of Appeals conflicts with a decision from this Court, any other court of appeals or any other court anywhere. Instead, CCQ merely contends that the courts below failed to properly apply the law to the facts of the case. Pet. 11, 19. The Petition, however, either ignores or distorts the very facts on which it seeks review. In fact, both the District Court and the Eleventh Circuit Court of Appeals properly applied the law to the facts set out above and properly excluded Ryan's damages testimony because it was unreliable, misleading and based on the worst of methods.

The law governing the admission or exclusion of Ryan's testimony has been clearly delineated by this Court in a trilogy of well-known cases, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire, Inc. v. Carmichael*, 526 U.S. 137 (1999). These cases hold that expert testimony must be reliable and supported by valid reasoning or methodology. *Daubert*, 509 U.S. at 579. Evidence which is not so supported must be excluded.

The *Daubert* trilogy makes two points abundantly clear. First, a district court must be assured that "any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. Such assurance is necessary to justify the wide latitude given to testifying

expert witnesses. *Id.* at 592. Thus, when expert testimony is called into question, "the trial judge *must* determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline." *Kumho Tire*, 526 U.S. at 149 (emphasis added, internal punctuation and citation omitted). The duty to screen expert evidence is the district court's "gatekeeper" function, and a judge cannot be excused from performing it. *Joiner*, 522 U.S. at 148 (Breyer, J. concurring).

Second, although the district courts must exercise their gatekeeper function, they have great discretion in how they choose to do so. This Court has emphasized the flexibility that the district courts enjoy when performing their gatekeeping role. *Daubert*, 509 U.S. at 594; *Kumho Tire*, 526 U.S. at 141. "The trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire*, 526 U.S. at 152. Evidentiary decisions made under *Daubert* are reviewed only for an abuse of discretion, and deference to the trial court is the hallmark of that review. *Joiner*, 522 U.S. at 143. The law grants the trial court "broad latitude" when it decides how to determine the reliability of expert testimony. *Kumho Tire*, 526 U.S. at 142. Using its discretion, a trial court may properly consider issues of judicial economy and conduct its gatekeeper inquiry in such a way as to avoid unnecessary proceedings and unjustifiable expense and delay. *Id.* at 152.

In this case, the Court of Appeals followed the law outlined above in its Opinion. It correctly noted that expert testimony should be admitted if (1) the expert is qualified to testify on the topic at issue, (2) the methodology relied on by the expert is sufficiently reliable and (3)

the testimony will assist the trier of fact. *Club Car*, 362 F.3d at 780; *see also*, Federal Rule of Evidence 702. Conversely, expert testimony based on unreliable or invalid methodology must be excluded. *Club Car*, 362 F.3d at 780; *see also*, *Daubert* 509 U.S. at 592. The Court of Appeals also noted that the trial court must screen expert testimony to determine if it is relevant and reliable. *Club Car*, 362 F.3d at 780; *see also*, *Daubert*, 509 U.S. at 589. Finally, the Court of Appeals applied the correct abuse of discretion standard to its review of the District Court's ruling. *Club Car*, 362 F.3d at 780; *see also*, *Joiner*, 522 U.S. at 143.

The Court of Appeals held that the District Court had not abused its discretion because Ryan's lost profit calculations were based on flawed methodology. *Club Car*, 362 F.3d at 780. This determination was specifically based on Ryan's admission that he had not factored in expenses and that his estimates were based on gross sales and gross profit figures. *Id.* The Court of Appeals also held that Ryan's testimony failed to comply with Georgia's common law of damages. *Id.* To recover lost profits in Georgia, "[O]ne must show the probable gain with great specificity as well as expenses incurred in realizing such profits. In short, the gross amount minus expenses equals the amount of recovery."[3] *Shaw v. Ruiz*, 207 Ga. App. 299, 304, 428 S.E.2d 98, 103 (1993); *see also*, *Club Car*, 362 F.3d at 780. Ryan's testimony failed to meet this standard. Finally, the Court of Appeals noted that the District Court made its ruling on Ryan's testimony after extensive *voir dire*,

[3] Georgia law governs the determination of damages because this is a diversity case arising in Georgia. *Complete Concepts, Ltd. v. General Handbag Corp.*, 880 F.2d 382, 389 (11th Cir. 1989).

cross-examination and argument on the issue. *Club Car*, 362 F.3d at 780. Based on these facts, the Court of Appeals held that the District Court "adequately developed the record necessary to exercise sound discretion, and did not err in holding the *Daubert* hearing during trial." *Id.*

CCQ now asks this Court to perform exactly the same review previously conducted by the Court of Appeals. There is no need for this Court to engage in such an exercise, which would be redundant and would not change the result reached below. CCQ alleges that the District Court's decision was based on irrelevant factors. Pet. 11. In support of this allegation, CCQ asserts that it made no claims for future damages against Club Car at trial and that Ryan's damages testimony was stricken in its entirety. Pet. 11, 13. As explained above, both contentions are untrue. Ryan presented damages testimony regarding lost profits for the years 2002 to 2005, and counsel for CCQ referred to these future injuries during his closing argument. App. 22, 79, 114. The District Court did not strike the entirety of Ryan's damages testimony, but only that testimony that "did not take into consideration the expenses involved." App. 113. Moreover, CCQ's Petition ignores the principal reason why Ryan's testimony was excluded: his failure to account for expenses when computing lost profits. The District Court and the Court of Appeals made it clear that this failure is what destroyed the validity of Ryan's testimony. App. 109; *Club Car*, 362 F.3d 780. Further review by this Court will not change this underlying flaw.

CCQ suggests that the Court of Appeals somehow acted contrary to this Court's opinion in *Bazemore v. Friday*, 478 U.S. 400 (1986). *Bazemore*, however, is in no way relevant to the case at hand. While this case involves

an expert witness whose damages testimony in a breach of contract case was stricken for his failure to include expenses when calculating lost profits, *Bazemore* involved an expert witness in a Title VII discrimination case who used multiple regression analysis to determine that certain employees were unfairly paid less than others. *Id.* at 398-99. Considering the issue, this Court held that a regression analysis need not incorporate every conceivable relevant variable to be admissible as expert testimony. *Id.* at 400. It made no determination related to computing lost profits.

The differences between *Bazemore* and the case at hand are manifest. The *Bazemore* expert offered testimony comparing salary levels between similarly situated employees. *Id.* at 399. Ryan offered testimony regarding lost profit damages. In *Bazemore*, the expert used multiple regression analysis to reach his opinion. *Id.* at 398. Ryan used a much less reliable technique by applying a gross margin figure to the number of lost sales he estimated CCQ had incurred. App. 83. The evidence in *Bazemore* was offered to prove liability and made no mention of lost profit damages. *Id.* at 398. The disputed evidence in this case was offered solely to prove damages. Moreover, *Bazemore* was decided seven years before *Daubert*, which indisputably controls this case. In short, the holding in *Bazemore* has no bearing on the case at hand.

CCQ also asserts that certiorari should be granted because the District Court lacked a proper evidentiary foundation to make its ruling. Pet. 15. CCQ states that no opposing expert was offered to discredit Ryan's testimony and claims that there was no basis to support the District Court's ruling. Pet. 16. This is nothing more than a claim that the District Court made erroneous factual findings

and is not a basis on which certiorari should be granted. Supreme Court Rule 10. Moreover, CCQ has produced absolutely no authority showing that the respondents had to offer an opposing "rebuttal" expert. Indeed, such a broad requirement would interfere with the flexible, case-specific inquiry mandated by the *Daubert* trilogy.

More importantly, CCQ's argument ignores the fact that Ryan's own testimony provided ample evidence for the District Court's ruling. Ryan testified that although his damages calculations failed to consider costs, such costs would need to be accounted for in the real world. App. 88. He also admitted that CCQ's financial statements, which did include costs, were created using generally accepted accounting principles. App. 50-51. As the District Court noted, Ryan destroyed the validity of his testimony himself, and no outside expert or additional evidence was needed to discredit him. App. 106. CCQ does not dispute that it had the burden of laying a proper foundation for the admission of its expert testimony. *See Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999). It failed to do so, and that portion of Ryan's testimony was properly stricken.

CCQ also complains that the factors justifying the District Court's ruling were not identified until after the trial. Pet. 18. CCQ did not raise this issue in the Court of Appeals below and consequently failed to preserve it for this Court's review. Moreover, its allegations are simply not true. As described above, Ryan's failure to deduct costs when calculating lost profits was identified and discussed at length at trial. It was the basis for the respondents' *Daubert* objection and the main reason why the District Court struck Ryan's testimony. App. 104, 113. Indeed, the District Court only struck Ryan's damages testimony

"when he says that he did not take into consideration the expenses involved and merely used the gross amount." App. 113. This instruction highlights the principal flaw in Ryan's methodology – his failure to account for costs. Ryan's failure to subtract from his calculations revenue that CCQ would have generated despite any deleterious actions by the respondents and to discount his future damages calculations to present value were also explained at trial. App. 86, 96.

The District Court detailed its trial ruling in response to the petitioners' post-trial motions, which sought a new trial in part based on the exclusion of Ryan's testimony. However, the District Court did not offer "after the fact" rationales for its ruling as claimed by CCQ. Pet. 19. It merely reiterated the evidence that had been presented at trial and repeated its ruling. Pet. App. 52a-58a. CCQ only complains that the District Court ruled on the post-trial motions before it.

CCQ next asserts that the respondents' *Daubert* motion was untimely. This issue was fully considered by the Court of Appeals, which held that "a trial court has broad discretion in determining how to perform its gatekeeper function, and nothing prohibits it from hearing a *Daubert* motion during trial." *Club Car*, 362 F.3d at 780. This holding follows this Court's decision in *Kumho Tire*, which stated:

> The trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or *when* special briefing or other proceedings are needed . . . as it enjoys when it decides whether or not that expert's relevant testimony is admissible.

Kumho Tire, 526 U.S. at 152 (emphasis added). The District Court's decision was also consistent with this Court's decree that a *Daubert* review is mandatory and cannot be avoided. *Id.* at 149.

CCQ does not assert that every *Daubert* motion brought at trial is *per se* untimely. Instead, it concedes that such challenges are appropriate, at least in certain "rare circumstances." Pet. 20. In fact, the case on which CCQ asks this Court to rely specifically holds that a district court has discretion to consider a *Daubert* challenge raised "on a motion in limine, on an objection during trial, or on a post-trial motion. . . ." *Goebel v. Denver & Rio Grande Western R.R.*, 215 F.3d 1083, 1087 (10th Cir. 2000). In short, CCQ simply asks this Court to second-guess the Court of Appeals and reconsider whether the facts in this case allowed for a *Daubert* challenge at trial.

The District Court expressed some concern about the timing of the respondents' *Daubert* challenge. App. 3. However, it eventually decided to strike Ryan's lost profits damages testimony because that testimony was worthless. App. 108-109. The Court of Appeals considered the issue and determined that there was an adequately developed record to support the District Court's ruling. *Club Car*, 362 F.3d at 781. CCQ has pointed to no conflict among the Circuits on the issue. It merely contends that the District Court abused its discretion in this particular case. There is no need for further review.

Finally, CCQ seeks certiorari because it claims Ryan's testimony was excluded based on the fact that he had never served as an expert witness before. As explained above, there is no factual basis to support this claim. Although the respondents objected to Ryan as unqualified, the

District Court held, "I am going to let him testify over your objection." App. 14. In fact, Ryan's testimony was excluded because his lost profits calculations were misleading and unhelpful to the jury.

At trial, the respondents and the petitioners were allowed to *voir dire* Ryan regarding his qualifications. App. 4-14. Ryan then testified at length on direct examination about his damages estimates and the methodology underlying his calculations. App. 15-57. His figures and methodology were subject to extensive cross-examination. App. 57-94. CCQ had the opportunity to rehabilitate Ryan's testimony on redirect examination. App. 94-103. The District Court then held a hearing outside the presence of the jury before it concluded that Ryan's testimony was inadmissible. App. 104-112. The petitioners filed lengthy post-trial motions which included argument on Ryan's testimony, and were afforded a post-trial hearing on the issue before the District Court decided to uphold its ruling excluding the disputed testimony. The Court of Appeals was fully briefed and heard oral argument on the merits of the District Court's *Daubert* ruling before it upheld that ruling in a unanimous opinion. It then considered and declined CCQ's application for rehearing *en banc*.

Throughout these proceedings, the respondents have explained that Ryan's failure to account for costs and expenses when computing lost profit damages rendered his expert testimony on that issue inadmissable. His methodology was contrary to rudimentary accounting standards, the common law of Georgia and common sense. Instead of explaining why Ryan's opinion should have been admitted or attempting to justify his failure to account for costs, CCQ has responded by raising a variety of specious arguments regarding the procedure by which Ryan's

testimony was excluded. What CCQ has not done, indeed what it cannot do, is explain how any additional procedure would have benefitted it. Ryan's testimony was and remains flawed, and none of the procedural remedies sought by CCQ would make that testimony acceptable.

In this regard, CCQ resembles the respondent in *Joiner*, who sought to offer expert testimony, based on animal studies, that certain chemicals had contributed to his cancer. *Joiner*, 522 U.S. at 144. When scientific flaws in this testimony were pointed out, Joiner failed to explain how or why the experts' opinions were valid, but instead "chose to proceed as if the only issue was whether animal studies can ever be a proper foundation for an expert's opinion." *Id.* In the same way, instead of attempting to demonstrate that Ryan's failure to account for costs when computing profits was proper, CCQ has chosen to proceed as if the only issue was whether a counter expert should have testified and whether the objection was timely. The methodological flaws in the testimony at issue in *Joiner* required that testimony to be stricken, and the methodological flaws in Ryan's testimony in this case required it to be stricken. *Id.* at 146.

The *Daubert* trilogy requires expert witnesses to "employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152. Ryan as much as admitted that he failed to meet this standard when he testified that in the real world, increased sales profits of any sort come with associated "incremental costs." App. 88. To be acceptable, his lost profit calculations should have accounted for those costs. In a slightly different context, this Court has recognized that "parties relying on expert evidence have had notice of the exacting

standards of reliability such evidence must meet." *Weisgram v. Marley Co.*, 528 U.S. 440, 456 (2000). Ryan's testimony failed to meet those standards. This Court has also explained that "[i]t is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail." *Id.* CCQ knew it needed to produce the best evidence possible to support its position. That evidence was defective and was properly excluded.

This Court has repeatedly emphasized the discretion and flexibility given to district courts asked to review the admissibility of expert testimony. *Kumho Tire*, 526 U.S. at 141. It has declared itself "confident that federal judges possess the capacity to undertake this review." *Daubert*, 509 U.S. at 593. CCQ acknowledges the inherent discretion that district courts have in this area and eloquently explains its purpose. "The reason *Daubert* has remained a flexible inquiry is so that courts can tailor their procedures and substantive inquiries to the facts and issues in the whole spectrum of cases that come before them." Pet. 21-22. CCQ also admits that this Court generally "should not tamper with that flexibility." Pet. 22. However, that is precisely what CCQ seeks to do in this case. Its Petition asks the Court to reexamine the factual findings underlying the District Court's evidentiary rulings and to reconsider whether the District Court abused its discretion in applying the law to those facts. This would convert the *Daubert* trilogy into a tetralogy, with the fourth case effectively overturning the holdings in *Daubert*, *Joiner* and *Kumho Tire* that the manner and method of the *Daubert* inquiry is best left in the hands of the District Court.

CONCLUSION

Ryan was hired by CCQ to calculate its alleged lost profits. He admitted that his calculations included only gross amounts. He further admitted what any layperson knows – that proper lost profit calculations would have accounted for expenses as well as income. His spurious calculations were properly excluded at trial under *Daubert*.

For these reasons and for the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES B. ELLINGTON*
THOMAS L. CATHEY
HULL, TOWILL, NORMAN,
BARRETT & SALLEY, P.C.
P.O. Box 1564
Augusta, GA 30903-1564
(706) 722-4481

**Counsel of Record*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

CLUB CAR, INC.,	: Case No. CV100-195
Plaintiff,	:
vs.	:
CLUB CAR (QUEBEC) IMPORT INC. and MARTIN MURPHY,	:
Defendants.	:
* * * * * * * * * * * * * * * * * * *	:
CLUB CAR (QUEBEC) IMPORT, INC.	:
Counterclaim Plaintiff,	:
vs.	:
CLUB CAR, INC.; PIERRE CHAMPIGNY; and EQUIPEMENTS PIERRE CHAMPIGNY, LTD.,	:
Counterclaim Defendants.	: Augusta, Georgia : February 13, 2003

VOLUME 4
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE ANTHONY A. ALAIMO
United States District Judge and a Jury

* * *

[IV-12] Q And do you remember this language being in the website back in the late '90s?

A I believe so, yes.

Q Now yesterday, Mr. Ellington asked you if you would have bought all of the used cars if you had had the same deal as Champigny, and you said, "You betcha."

My question to you is: Were you offered the same deal as Mr. Champigny – ever?

A That's the crux of the problem. I wasn't offered the same deal.

MR. PENN: Thank you.

THE COURT: Anything else?

MR. ELLINGTON: Nothing else, Your Honor.

THE COURT: All right. You may stand down, Mr. Murphy.

THE WITNESS: Thank you.

THE COURT: Call your next witness.

MR. HARRIS: Your Honor, we would call Peter Ryan.

MR. ELLINGTON: Your Honor, we have a matter that should be taken up outside of the jury's presence with respect to Mr. Ryan's testimony.

THE COURT: Did you know that Mr. Ryan was going to be called?

MR. ELLINGTON: Not at 9:00 o'clock. We had Mr. Murphy coming in first.

[IV-13] THE COURT: Nevertheless, did you know he was going to be called?

MR. ELLINGTON: We knew he was going to be called this morning.

THE COURT: I wonder why you did not call my attention to that before the jury came in.

MR. ELLINGTON: I apologize, Your Honor, but this is a matter that should be taken up outside the jury's presence.

THE COURT: Well, do you want to come up to sidebar?

(At sidebar on the record)

MR. ELLINGTON: Your Honor, Mr. Ryan is going to be testifying –

THE COURT: I cannot hear you.

MR. ELLINGTON: Your Honor, Mr. Ryan is going to be testifying on behalf of CCQ against the counterclaim co-defendants and offering scientific or expert testimony. We believe the Court should examine its gatekeeper function with respect to Mr. Ryan –

THE COURT: You should have called my attention to it long before this.

MR. HARRIS: Absolutely, long before this.

(End of discussion at sidebar)

THE CLERK: Would you raise your right hand to be [IV-14] sworn?

PETER J. RYAN, DEFENDANT CCQ'S &
MARTIN MURPHY'S WITNESS, SWORN

THE CLERK: You can be seated.

Please state your full name, spell your last, state your residence and occupation.

THE WITNESS: My name is Peter George Ryan, R-Y-A-N. I live in Oakville, Ontario, in Canada.

DIRECT EXAMINATION

BY MR. PENN:

Q Good morning. You have traveled a very long way to be here this morning.

A Yes, I have.

Q Where did you come from?

MR. PURCELL: Your Honor, I'm going object to that. It doesn't matter where he's traveled from.

THE COURT: It really does not. We accommodated you by waiting anyhow. But go ahead.

MR. PENN: I apologize, Your Honor.

BY MR. PENN:

Q If you could, please describe for us your educational background?

A I received my preliminary education in Ontario. I attended University of Windsor in Windsor, Ontario where, I graduated with an Honours, Bachelor of Business.

[IV-15] I then completed the Chartered Accountants program in the Province of Quebec and was admitted to the Institute of Chartered Accountants in Quebec and subsequently in the Province of Ontario.

THE COURT: Would you give us the dates of these things? When did you graduate?

THE WITNESS: I graduated in 1966. I was admitted to the Quebec Institute of Chartered Accountants in 1970 and to the Ontario Accountants in 1986.

MR. PENN:

Q And you mentioned Chartered Accountants. What does Chartered Accountants mean?

A The Institute of Chartered Accountants in Canada would be the equivalent of the certified public accountant in the United States.

Q And can you just briefly go over with us a little bit of your work history?

A I worked for a firm of chartered accountants in the City of Montreal from 1966 to 1971. I was employed by the Canadian Subsidiary, a private Swiss bank, from 1969 to 1973.

I traveled overseas in Europe and Australia from 1973 to 1976.

I returned to work for the Swiss bank on my return to Montreal.

[IV-16] I then worked for a company which was an importer and manufacturer of sporting goods, primarily sporting goods.

And subsequent to that, I worked for a communications and telemedia, a Canadian company.

And then, after moving to Toronto in 1986, I worked with Mr. Paul Boffman managing his personal companies and acquiring companies for him.

Q Do you have experience in evaluating businesses?

A Throughout my business career, I have been involved in several acquisitions on behalf of the parties that I work for. And part of that process would involve analytical work in these evaluations.

THE COURT: Mr. Penn, did you file a CV in this case?

MR. PENN: We did, Your Honor.

THE COURT: You did?

MR. PENN: We did.

THE COURT: All right. Go ahead. I generally handle that aspect of it.

MR. PENN: Okay. I'm sorry. I didn't know that's the procedure.

THE COURT: You know what the rule is. You were notified of that in the pretrial discussion. But nevertheless, go ahead.

MR. PENN: All right. Thank you, sir.

[IV-17] Just to clarify, is my understanding of that to just proceed on and not cover all of his qualifications if the CV has already been filed?

THE COURT: Let me see the CV.

MR. HARRIS: Your Honor, we filed it in Savannah.

THE COURT: You do not have a copy? Well, that is all right. We will find one here.

MR. HARRIS: We do, Your Honor, but I don't think we brought it.

THE COURT: Well, I will ask him some general questions.

Mr. Ryan, you have described your work history since you graduated; have you not?

THE WITNESS: Yes, Your Honor.

THE COURT: Have you published anything in your specialty?

THE WITNESS: No, Your Honor.

THE COURT: Have you appeared as a witness, an expert witness, in any case before?

THE WITNESS: No, Your Honor.

THE COURT: All right. Mr. Ellington, do you desire to voir dire him on his qualifications?

MR. PURCELL: I do, Your Honor.

THE COURT: All right. Go ahead, Mr. Purcell.

MR. PURCELL: Thank you, Your Honor.

[IV-18] VOIR DIRE EXAMINATION

BY MR. PURCELL:

Q Mr. Ryan, you have not been working in the public accounting business, have you?

A As a public accountant?

Q Yes, sir.

A No.

Q You are Mr. Murphy's best friend, aren't you, sir?

A He is a personal friend, yes.

Q And, Mr. Ryan, you, in evaluating this case and the opinions you have reached –

THE COURT: Wait a minute. I just want to go into the qualifications. Do you wish to cross-examine him on that?

MR. PURCELL: I wish, Your Honor, to see what the witness did before the jury hears scientific testimony and expert testimony in this case.

MR. HARRIS: I object. They've had an opportunity to Daubert this witness for six months. Why they chose to do it now, I don't know.

MR. PURCELL: Your Honor, that's not discretionary. The Court must exercise its gatekeeper function before the jury.

MR. HARRIS: But –

MR. PURCELL: May I finish? – before the jury [IV-19] hears scientific evidence. Accounting evidence is well-known scientific evidence. This is –

THE COURT: All I want to do is question his qualifications, if you can.

MR. PURCELL: Yes, sir.

BY MR. PURCELL:

Q So you have never testified as an expert, have you?

A No.

Q You have never been offered as someone who appraised damages in an economic loss case, have you?

A No.

Q You have never studied the area of economic damages and reported any cases of economic damages, have you?

A I'm not clear on the question.

Q You have never done a study of economic damages on a business loss case and reported on that before, have you?

A Before this, no.

Q As a matter of fact, this is your very first experience in such an exercise, isn't it?

A Yes.

Q And you have never, in your entire career, been engaged in the business of public accounting, even though

you are a chartered accountant in Canada; isn't that right, sir?

A No.

Q Isn't it –

[IV-20] A No, that's not right.

Q You, for the past twenty years, you haven't been a public accountant, have you?

A I have not been full-time employed in the practice of public accounting.

Q In fact, the financial statements, which are here, I believe, in evidence, were not financial statements of this business that you prepared, were they?

A I couldn't answer that without some time frames.

Q Mr. Ryan, the financial statements bear on their very face that they were prepared by somebody else; you're not disputing that?

A Some financial statements were prepared by other people, yes.

MR. HARRIS: Your Honor, I would object if he's going to examine him about financial statements.

MR. PURCELL: I'm not –

MR. HARRIS: Financial statements are –

MR. PURCELL: I'm just going into his qualifications.

THE COURT: Go ahead.

MR. PURCELL: Thank you.

BY MR. PURCELL:

Q And the information you gained, Mr. Ryan, was supplied by Mr. Murphy, wasn't it?

[IV-21] A The information that I gained was from my examination of the financial records of Club Car (Quebec) and the other companies involved.

I had been involved as a financial professional all my working career. And the fact that I was not in the practice of public accounting doesn't –

Q Thank you very much, Mr. Ryan, but if you can restrict your answers to the question that was asked, and we can move a little faster.

Mr. Ryan, you were at business meetings as a business advisor helping the Murphys, weren't you.

A Yes, sir.

Q That was your role. We heard the testimony, and I won't belabor that by going through all the meetings.

MR. PURCELL: Excuse me.

(Pause)

MR. PURCELL: That's all I've got on the witness' qualifications at this time, Your Honor.

THE COURT: Mr. Ellington?

MR. ELLINGTON: Nothing in addition to what Mr. Purcell has done.

THE COURT: Do you submit that he is not qualified to give an expert opinion in this case?

MR. ELLINGTON: Yes, Your Honor. That is our position. He is not qualified as an expert for the reasons [IV-22] laid out.

MR. HARRIS: Your Honor, can I respond?

THE COURT: Of course,

MR. HARRIS: He is the – has been the accountant for this company. He has been the financial advisor to this company. There's no one who knows this company better than this man. And he's going to talk about –

THE COURT: You are doing a good bit of testifying. I did not hear all of that from the witness.

The fact of the matter is he indicates that he has never really studied the business of – the subject upon which you have put him up here for.

MR. HARRIS: Your Honor, we think we can lay the foundation that he's –

THE COURT: That's one of the problems here when you have multiple lawyers. Since he put the witness up, I will have him state the objection, if he has any.

MR. PENN: Your Honor, we believe we can lay the foundation for Mr. Ryan's qualifications. And we got cut off right in the middle of the foundation questions.

THE COURT: He already said that he had no experience in that particular field.

MR. PENN: Your Honor, he has testified that he has twenty years experience as a financial accountant, and he has been the accountant for CCQ for 20 years.

[IV-23] THE COURT: Well, he specifically said he had no experience in that field and had never testified before in that field.

I am going to sustain the objection.

MR. PENN: Your Honor, I don't believe – he's not testifying in the field of just public accounting. He's testifying in the field as a financial advisor, financial analyst, as well as his specific experience as an accountant for CCQ over the last twenty years.

THE WITNESS: Your Honor –

THE COURT: Just a minute.

MR. PENN: Your Honor, we would request that the jury be excused so we can have a hearing on this.

THE COURT: All right. Members of the jury, please go to the jury room.

(Jury out at 9:29 a.m.)

MR. PENN: May I continue, Your Honor?

THE COURT: Yes.

MR. PENN: This is an absolute ambush on the morning this witness arrives from Australia to testify in this case. He has been identified as an expert for well over a year and a half. He has been deposed at least twice. They never raised a *Daubert* motion before. This Court gave detailed lines for filing a motion in limine, and they have not filed it.

[IV-24] And then this morning, after interrupting a trip to Australia so he can come to testify, they raise this

issue. He has testified that he has experience valuing businesses.

THE COURT: I heard his testimony, and I stated to you my observations of what he said. He has testified that he is an accountant, a chartered accountant. He said he had no experience whatever in evaluating the type of damages he is claiming to have done in this case.

MR. PENN: Your Honor, that's incorrect. He did not say that. That is not his testimony.

THE COURT: Nevertheless, that is what I heard.

MR. PENN: Your Honor, I would disagree with the Court's conclusion on his testimony. I got interrupted –

THE COURT: Why not ask Mr. Ryan what experience he has with CCQ and the cash flow coming in and out of the business, how the impact of Mr. Champigny's business will affect CCQ, and then the value of its business? He can testify to that. Why not ask Mr. Ryan that?

I think in view of the fact that you, as counsel for Mr. Champigny, and the Plaintiff waited until this moment to object is untimely. He filed whatever his statement was, in accordance with the rules of procedure, as to what he was going to testify to. There was no objection to that up to this point.

[IV-25] And I think, to some extent, counsel is right. I am going to let him testify over your objection.

So bring in the jury. But now, you are limited to whatever statement of his opinion was filed in this case. He is limited to just that kind of testimony and no more.

MR. PENN: Correct, Your Honor.

(Jury in at 9:35 a.m.)

THE COURT: And may I have a copy of that?

MR. PENN: Would you like a copy of his report?

THE COURT: Yes.

MR. PENN: Your Honor, he also has – at Exhibit 147, he has a number of summaries that he has provided that contain all kinds of financial data that he pulled out of the seven boxes that are in the back row back there.

THE COURT: I am not concerned with that. He is limited in his testimony to what you filed here was his opinion.

MR. PENN: Your Honor, the summaries go with his report. That's what I was pointing out.

THE COURT: All right.

MR. PENN: And the summaries are in evidence.

THE COURT: All right.

DIRECT EXAMINATION (Continued)

BY MR. PENN:

Q Mr. Ryan, before we were interrupted, we were [IV-26] discussing your qualifications.

Let's talk about specifically your experience with CCQ. Can you go over that with us, please?

A CCQ was formed on or about 1980. Mr. Murphy asked me if I would be his accountant at that point in time, with the exception of the three-year hiatus when I was overseas from '73 to '76.

And I have been Mr. Murphy's accountant and business adviser in various capacities.

Q And how long a period of time is that again?

A My original involvement with Mr. – with Club Car's business specifically would have started in 1980 to date.

Q And as their accountant, what kinds of things did you do for the company?

A I would meet with the Murphys on a regular basis and review their financial results, assist in the preparation of the financial statements, preparation of income tax returns, et cetera.

We would also meet to discuss the current situation in the Quebec market and competitive situations, anything that might arise in the normal course of business.

Q Okay. Over those twenty years, were you able – or did you have an opportunity to become familiar with the golf cart market in Quebec?

A Yes.

[IV-27] Q And the sales of golf carts?

A In terms of volumes and market share, yes.

Q Did you also perform any analysis of sales figures or any other thing that has to do with the sale of golf cars?

A I would perform an analysis of the financial results for the Murphys on a regular basis.

Q Okay. Did you calculate margins?

A Yes.

Q Did you calculate profits?

A Yes.

Q Did you calculate losses?

A Yes.

Q Did you calculate gross revenue?

A Yes.

Q Sales volumes?

A Yes.

Q Net income?

A Yes.

Q What other kinds of things did you account for?

A In the course of reviewing financial results for a private company and operating company, we would look at all the expenses and costs of doing business, review them on a regular basis.

Q And as the accountant for CCQ, did you have complete and full access to all of their financial information?

[IV-28] A Yes, sir.

Q Did you actually prepare tax returns for the corporation?

A Not in the most recent years. But prior to moving to Toronto and up to about 1990 to '91, yes.

Q Have you ever filed – or prepared financial statements for the corporation?

A Yes.

Q Are there any other aspects of the financial analysis of the business that I have left out that maybe we should go over?

A I have used my thirty odd – thirty-five years experience in working as a financial person to analyze virtually every aspect of the operation of Club Car (Quebec) and any documents that have been provided in connection with this case.

Q And you testified, I believe, earlier that you had experience in the sales of businesses?

A Yes.

Q And as part of that, do you also have to calculate the value of businesses?

A Yes.

Q All right. Have you been retained as an expert witness in this case?

A Yes.

[IV-29] Q As part of that, what were you asked to do?

A I was asked to review the situation and assess the damages involved in this case.

A Okay.

Q And as a part of that, did you have an opportunity to review any information in arriving at your opinions?

A I have spent a considerable amount of time reviewing tens of thousands of pages of documents in this regard.

Q And I alluded to earlier in reference to this, there is a back row there of several boxes.

Do you recognize the boxes?

A I recognize the boxes. They contain the documents that I have reviewed, yes.

Q As a part of your review, or as a result of your review, did you prepare any documents to assist you in deriving your opinions?

A As an ongoing procedure, I prepared a series of accounting spreadsheets and analytical spreadsheets to support my conclusions.

MR. PENN: Bob, if you will put Exhibit 147.

BY MR. PENN:

Q And I want to just go through this quickly. Do you have your summaries with you?

A No, I don't.

MR. PENN: Your Honor, may I approach the witness?

[IV-30] BY MR. PENN:

Q And are those the summaries that you prepared in connection with this case?

A They appear to be, yes.

MR. PENN: Just briefly, Bob –

BY MR. PENN:

Q I'm not going to go through every one of them because how many pages do you have in front of you?

A Probably a hundred and fifty.

Q A hundred and fifty pages. If we just flip a few of the first pages, what kinds of information do we have on these pages?

A This particular document was a work sheet which calculated the market share of the various manufacturers in the Province of Quebec.

MR. PENN: Bob, go to the next page, just through a couple of pages.

BY MR. PENN:

Q This one was the sales history of –

A That is the sales history of Club Car product, again, in the Province of Quebec for the years 1998 to 2000.

Q And go to the next one. What is this one?

A Those would be supporting the previous schedule. Those would be the years of '98, '99, 2000 on an individual basis.

Q Go to the next one. Again, sales history?

[IV-31] A Sales history.

Q And what other types of summaries or charts or information do you have in there?

A I have an analysis of the purchases between Mr. Champigny's company and Club Car International. I have an analysis of the documents produced by Mr. Champigny, being the purchase invoices, the various Customs and import documents relative to the shipping of cars and parts packages.

And anything that varies on my report, in all likelihood, has a supporting schedule of some kind.

Q All right. And do you have a copy of your report? It's not with the summaries.

A No, not with those documents.

MR. PENN: Your Honor, may I approach the witness, again?

BY MR. PENN:

Q Is this a copy of your report?

A Yes, it is.

Q And I don't want to go through the entire report, but I believe at the last page, you have some conclusions.

A Yes.

Q And if you could, just tell us what your conclusions were in the report?

A After a considerable amount of time reviewing not only [IV-32] the documents but the history over the period of time, I concluded that Club Car (Quebec) had suffered damages as a result of the actions of Club Car, Inc. and Equipements Pierre Champigny.

Do you want me to quantify them according to this report?

Q Yes. Go through the different ones that you have in that report.

A As of the date of this report, I had determined that the damages were as follows:

Lost sales on one year old cars in '97 to 2000 in the amount of $821,832.

Damages on parts packages sold to Equipements Pierre Champigny in the amount of $921,435.

Damages as a result of lower margins on new and one year old cars in the amount of $414,986.

Unpaid commissions in U. S. dollars, $201,100.

An amount representing provincial sales tax of $171,064.

The damages resulting from new car sales in 2001 in the amount of $940,384.

Lost sales of new cars for the period of 2002 to 2005 in the amount of $5,463,108.

Profits on parts sales from 2001 to 2005 in the amount of $1,355,229.

[IV-33] The total damages identified in my report at that date are $10,464,176.

Q Okay. Now since that time, have you revised those numbers based on the claims that exist today?

A Some of the damages that I have identified I believe have not been presented as claims in this court. But by and large, those claims which have been presented reflect the numbers in this court.

Q And have – since some of the claims have not been presented, are there revised numbers within that framework of the numbers that you provided earlier?

A There may be minor changes in terms of the number of units or variations of percentage or average selling price, something like that.

Q Let's talk about some of the specific numbers.

MR. PENN: Bob, if you will put up the damages.

BY MR. PENN:

Q Let's talk about how you arrived at these numbers.

One portion is the calculation of damages for the sale of free new parts.

And can you see that, by the way?

A Yes, I can.

Q If you want a copy –

MR. PENN: Your Honor, may I approach?

THE COURT: Yes.

[IV-34] MR. PENN: Thank you.

BY MR. PENN:

Q Under (A), what is this calculation right here?

A During the course of reviewing the documents which were produced, it was discovered that Club Car had been – Club Car, Inc. – had been shipping parts packages to Mr. Champigny with his cars.

That information came – what I did was – Mr. Champigny produced his Customs documents. After a considerable period of time and considerable reduction in the number of documents due to duplication, I prepared a summary.

MR. ELLINGTON: Your Honor, I hate to object, but I'm going to object here because the testimony we're seeing now is brand-new testimony outside of the scope of his expert report. These type of calculations have not been presented here before.

MR. PENN: Actually, it comes right out of his report.

MR. PURCELL: I'm going to object, too, because I have a document that's got a different number on it.

THE COURT: You can cross-examine him on that.

MR. PURCELL: I understood the Court to limit the witness to his report.

THE COURT: Yes, yes.

[IV-35] Point out in the report what you're questioning him about, where in the exhibit it is.

BY MR. PENN:

Q Where does this –

THE COURT: No, no. My question is: Where in the report he filed, where is it?

MR. PENN: Right. That is my question to Mr. Ryan.

THE COURT: All right.

BY MR. PENN:

Q Mr. Ryan, where does this section (A) come from in your report?

A Section (A) refers to, under my summary and conclusions, item two, Damages on Parts Packages.

Q What is the number on your report?

A The number on my report is $921,435.

Q All right. And the number here is a little higher. Can you give an explanation as to why, what is the difference?

MR. PURCELL: Judge, he –

THE COURT: He cannot testify to that. He is limited to this.

MR. PENN: Okay. Thank you, Your Honor.

MR. PURCELL: And we would object to the screen showing the jurors numbers other than what is on the report,

[IV-36] Judge.

MR. ELLINGTON: I have the same objection.

THE COURT: I will sustain the objection.

MR. PENN: May I consult with co-counsel for a second?

THE COURT: Certainly.

(Pause)

BY MR. PENN:

Q Mr. Ryan, the numbers that were on the screen, the total numbers for everything that is in that demonstrative exhibit, are they higher or are they lower than the numbers in your report?

A I would say for all intents and purposes, they are virtually identical. There are minor differences, certainly.

Q You just gave us a total –

THE COURT: Go on to your next question.

MR. PENN: I don't think he understood my question, Your Honor.

THE COURT: Did you understand his question?

THE WITNESS: I'm not sure I did, Your Honor.

THE COURT: All right. Go ahead. Restate the question.

BY MR. PENN:

Q Give us again, what is the total number that was on [IV-37] your report?

A The total number on my report was $10,464,176.

Q And what was the total number for the revised number that came out of your report?

A The total number, based on an extrapolation of my report ranged from $5,395,994 to $5,870,936.

Q So the revised numbers that are based on your report are lower than the numbers that were in your report?

A Yes, they are.

MR. PENN: Your Honor –

THE COURT: Generally speaking, his testimony is limited to what he filed in this Court, or rather the opinion that you filed in this Court.

BY MR. PENN:

Q Okay. Let's go back to your report, Mr. Ryan, and let's talk about the first conclusion.

What was the number again? What was the conclusion and what was the number?

A The conclusion was that the damages on lost sales of one year old cars for the period 1997 to 2000 was $821,813.

Q All right. And that was for the loss of new sales?

A That would have been the gross margin on the sale of one year old cars for that period of time.

Q Okay. And how did you arrive at that calculation?

A After reviewing all the invoices between Club Car, Inc. [IV-38] and Equipements Pierre Champigny and after reviewing the Customs documents, et cetera, from Mr. Champigny, I determined the number of one year old cars that were sold during that period of time and the retail value, and applied a margin to that number.

Q Okay. How many cars did you determine were sold?

A May I refer to the report?

Q Yes.

A There were nine hundred and sixty-three one year old cars during that period of time.

Q And then take us through your calculations. You have nine hundred and sixty-three cars –

A Nine hundred and sixty-three cars. The relative sales volume was $3,742,928. And the margin I used was 20.56 percent.

Q Where did you get the 20.56 percent margin?

A The 20.56 percent was the margin on Club Car (Quebec)'s business in 1997.

Q Is that an average margin?

A That is an average of new and used product, yes.

Q And in applying that calculation, you came up with that number?

A Yes.

Q And go to your second conclusion.

A The second conclusion was the damages on parts packages [IV-39] in the amount of $921,435.

Q How did you calculate that number?

A After reviewing the invoices between Club Car, Inc. and Equipements Pierre Champigny, reviewing the Customs documents, sorting them in a useful format to eliminate duplication, it became clear that, as a regular practice, Club Car was providing parts packages with the shipments of cars.

I determined that it was not possible, based on the information that had been provided, to be absolutely specific about the number of parts packages. But from the review of the documents, it was apparent to me that it was normal and in virtually 100 percent of the cases, I decided to, in the interest of being conservative, to use a factor of 90 percent.

I applied the 90 percent factor to the total number of cars shipped to Pierre Champigny during that period of time.

I determined the value of the parts packages by referring to a Customs document where the Quebec sales tax was actually paid on parts packages.

And I calculated the cost of these parts by reference to the pricing manual from Club Car, and then applied the gross profit on a per package basis to the number of packages that I previously calculated.

Q Did the value of the parts packages, what values did [IV-40] you arrive at?

MR. PURCELL: Objection, foundation.

MR. ELLINGTON: Objection also.

MR. PURCELL: He said it was a wild guess, Judge. He said the documents didn't supply – didn't give him any numbers, so he decided to be conservative and use 90 percent.

MR. ELLINGTON: I so object, Your Honor,

MR. PENN: May I respond, Your Honor?

THE COURT: Of course. You do not have to ask me that question. Go ahead. You have been doing it all along.

MR. PENN: Your Honor, he testified that the 90 percent number he came up with, the factor that he multiplied it by, came from the documents that he got. And that was just one that he didn't have the specific number on.

THE COURT: What did the "wild guess" refer to?

MR. PENN: The 90 percent is what they're saying is a wild guess.

THE COURT: No, I will sustain the objection on that.

I wish to ask him one question. These are Canadian dollars figures; are they not?

THE WITNESS: Yes, they are.

THE COURT: All right.

[IV-41] BY MR. PENN:

Q Mr. Ryan, how did you arrive at the value of a parts package?

A There is a document attached to my report. When goods are imported from the U. S. to Canada, Customs documents are prepared detailing exactly what is crossing the border.

The Customs broker then prepares what is referred to as a commercial invoice. And any amount of taxes and/or duties that is due at that point in time is computed at that point in time.

I located in the documents two invoices from the Customs broker. They indicated that the cost value, on which is the basis of the payment of the tax, was, again, from memory referring to my specific work sheet, in the vicinity of four hundred and sixty some odd dollars.

And I took that parts package and the pricing manual of the parts from Club Car International for Canadian prices and determined what the retail value of that parts package was.

Q What was the retail value?

A The retail vale [sic] was, again, somewhere in the vicinity of nine hundred and seventy-five to two thousand dollars.

Q Based on the retail value and the – I guess the wholesale value that you came up with out of the Customs documents, did you calculate a margin?

[IV-42] A Yes, I did.

Q What would be the amount of the margin?

A The margin would have been the difference between the two.

Q What was the amount?

A Using nine seventy-five and four sixty-eight, the difference would be five hundred and seven dollars in gross profits per package.

Q And you used that number as part of your calculations for the parts packages?

A Yes, sir.

Q What was the total amount of those damages?

MR. PURCELL: I object, Your Honor. He still hasn't testified about the number of parts packages, how that number was reliably arrived at and, in fact, said that there was no reliable evidence in his summary of documents at which he could arrive.

So he decided to be conservative and apply the 90 percent.

MR. ELLINGTON: Same objection, Your Honor.

MR. PENN: May I ask a couple more questions of Mr. Ryan?

THE COURT: Sure. As it is, I am going to sustain the objection, but go ahead.

[IV-43] BY MR. PENN:

Q Mr. Ryan, let's talk about that 90 percent number again. That's on the number of parts packages that Mr. Champigny was getting.

From what documents did you derive that number?

A I derived that number from a summary – excuse me – a summary spreadsheet which I prepared, which listed all the shipments of used cars from Club Car International to Equipements Pierre Champigny for the period in question.

The total number of cars was in excess of two thousand.

Q Okay. And the summary sheets came from documents that were produced by whom in this lawsuit?

A They were produced by Club Car, Inc. and by Equipements Pierre Champigny.

Q So they were not documents provided by CCQ?

A No, they were not.

Q And out of those documents, you created a summary sheet?

A I did.

Q And you determined how many parts packages had been shipped?

MR. PURCELL: I object. That's leading, and that's not the testimony.

THE COURT: I confess, I did not hear the question. Do you want to restate it?

[IV-44] BY MR. PENN:

Q And you found out there were how many parts packages shipped?

THE COURT: What is your objection?

MR. PURCELL: My objection, Your Honor, is he says the document shows his summary. The number of cars, not the number of parts packages shipped. That's my objection. And then he's leading.

THE COURT: The objection is sustained, and do not lead.

MR. PENN: I'm sorry, Your Honor.

BY MR. PENN:

Q How many cars did you determine were shipped?

A In the vicinity of two thousand one hundred.

Q And based on the number of cars that were shipped, did you have invoices for those cars?

A Yes.

Q Did those invoices include anything in addition to the cars?

A No. But when you're reviewing the documents, it is impossible to review the documents in isolation.

When you're importing documents – excuse me – when you are importing materials across the border, there is a package of documents which exist which is the commercial invoice, the Customs declaration. Customs declarations [IV-45] indicated parts packages in some but not all cases.

Q Okay. And based on the documents that you had to review, were you able to arrive at a percentage of the time that Mr. Champigny received parts packages?

A It was my opinion, after reviewing the documents, that there was a regular pattern of providing parts packages with shipments of cars. And where they were not provided at the time the cars were shipped, they were back ordered and shipped at a later date.

Q Okay. And were you able to determine how often or what percentage of time Mr. Champigny received parts with cars?

A I would have to refer again specifically to the spreadsheet that I prepared because the documents –

THE COURT: Is your answer you do not know?

THE WITNESS: No, Your Honor. I can determine – if I'm allow to refer to my spreadsheet where I have been able to identify specifically where parts packages were shipped with various shipments.

THE COURT: You are entitled to look at whatever you have.

BY MR. PENN:

Q Mr. Ryan, are the spreadsheets up there?

A According to the summary, the total number of cars that were shipped in the period in question is two thousand, one hundred and twenty-four. I identified as of the date that [IV-46] this report was prepared parts

packages which matched up with invoices and shipments of one thousand and sixty-four.

But there were a considerable number of back orders and back shipments which I could not identify and match up against a particular shipment.

Q Okay. And based on the review of the documents and the numbers that were provided in your summary, did you calculate a percentage of time that Mr. Champigny received parts packages?

A It was my opinion that the 90 percent would represent a reasonable conclusion.

Q Now did you review – did part of the information that you reviewed, did it include anything else in the case – like testimony?

A I reviewed my own depositions. I reviewed – I'm working from memory. I reviewed depositions, but I can't be absolutely certain which ones I did and did not review.

Q Did you review the deposition of Mr. Champigny?

A Yes, I did.

Q Okay. Let's go to your next – we were just talking about item number two, correct?

A Yes.

Q And the total number for that was nine hundred.

MR. PURCELL: I'm going to object, Your Honor. That's what is based on the 90 percent figure. He has just [IV-47] given us a 50 percent statistical calculation, more or less, that he was able to trace of used car parts packages.

And now he's using, once again, the 90 percent number with no foundation.

MR. ELLINGTON: That is the basis of my objection also, Your Honor.

MR. PENN: Your Honor, we just laid the foundation the he reviewed seven boxes worth of documents, and they were documents produced by Mr. Champigny.

THE COURT: What about his specific objection?

MR. PENN: He said based on his review of the documents and based on his summary – he just read off the numbers – he felt, in his opinion, the percentage of time that Mr. Champigny got parts packages was 90 percent.

MR. PURCELL: Judge, what he said was he found a thousand, sixty-four parts packages on all of the documents he reviewed, out of twenty-one hundred and twenty-four cars that were sold. I'm no mathematician, but that's less than 50 percent.

THE WITNESS: That –

THE COURT: Just a moment.

MR. PURCELL: There is no basis for his conclusion of 90 percent. That's my objection.

MR. PENN: That's not his testimony, first of all. He gave statistical numbers. Then he said there were a [IV-48] number of other documents that he couldn't match with anything that were back ordered parts.

And in addition to that, Your Honor, if they have an objection to that number, that is a matter for cross examination for credibility not admissibility.

THE COURT: All right. Go ahead.

And, members of the jury, you are the exclusive judges of the credibility of the witness. And merely because an expert witness testifies to certain matters as his opinion, you are not bound by that opinion. You may disregard it or give it credit.

So go ahead.

MR. PENN: Thank you, Your Honor.

BY MR. PENN:

Q Again, what was the number of the second one?

A The damages on the parts packages, the amount was $921,435.

Q Let's go down to the third line. And that's damages on lower margins on new and one year old cars sold.

How did you arrive at that calculation?

A Using 1997 as a base year, before the impact of one year old cars in the marketplace, Mr. Murphy and Club Car (Quebec)'s gross margin was twenty point – I think the precise number is five six percent.

By analyzing Club Car (Quebec)'s results for the [IV-49] subsequent three years, I determined that there had been a significant reduction in the margin from 1997. And based on Club Car (Quebec)'s sales volumes for those

years, I determined the dollar value attributable to that reduction margin.

Q What was the dollar value?

A The dollar value in my report is $414,986.

Q Now the fourth item.

MR. ELLINGTON: Your Honor, I'm going to object to the fourth item. That has been ruled on in this case thus far. That was a matter that was ruled on by Your Honor in the late fall and was addressed last week.

MR. PENN: Could we have a sidebar, Your Honor?

THE COURT: I guess so.

(At sidebar on the record)

MR. PENN: Your Honor ruled that these damages, as to Club Car's damages, are part of the tort claims, the interference with the business arrangement.

MR. HARRIS: That was your ruling at the hearing.

THE COURT: Just one of you.

MR. PENN: I'm sorry.

MR. ELLINGTON: He said as to Club Car. They're out as to Club Car. I'll second that.

MR. HARRIS: You didn't ask –

MR. PURCELL: Judge, they are out as to us, as [IV-50] well. If there is not an enforceable contract, they

can't have an interference with a contract. That's not what, under Canadian contract law, is required.

MR. PENN: That's an incorrect statement of Canadian law.

THE COURT: Well, go ahead. I am going to let it go in to the jury.

MR. ELLINGTON: Very well, Your Honor.

MR. PURCELL: We have two minds about it.

MR. ELLINGTON: Let me get my objection on the record.

THE COURT: I beg your pardon?

MR. ELLINGTON: If you are going to let it in, I'm going to object on the record on behalf of Club Car.

MR. PURCELL: And I will, too.

(End of discussion at sidebar)

THE COURT: Go ahead.

BY MR. PENN:

Q Number 4, the unpaid commissions, that was for the hundred dollar (U.S.) commissions for the sale of used cars?

A Yes.

Q And did you calculate those damages?

A Yes, I did.

Q How did you do that?

A By reviewing the documents produced by Mr. Champigny [IV-51] and Club Car International, I determined the number of Club Car cars that had been sold to Mr. Champigny.

THE COURT: When?

THE WITNESS: During the five year period, Your Honor.

BY MR. PENN:

Q Give Your Honor the years. What years?

A That would be 1997 to 2000.

THE COURT: When was the letter of initiation?

MR. ELLINGTON: July 24, 1997, as I recall, Your Honor.

THE COURT: All right. With respect to that, the objection is sustained, because that relationship was terminated by that letter.

MR. PENN: Correct, Your Honor. And the claim is that there was interference with that relationship.

THE COURT: No, sir. The objection is sustained.

MR. PENN: Thank you, Your Honor.

BY MR. PENN:

Q All right. Go down to the fifth item. That was provincial sales tax.

A Correct, yes.

Q Is that also QST?

A QST refers to Quebec sales tax.

Q And what was the number of the damages there?

A [IV-52] I don't recall the specific date, but at that point in time, Club Car, Inc. was deemed to be carrying on business in the Province of Quebec and had a legal obligation.

MR. ELLINGTON: Objection, Your Honor. That calls for a legal conclusion by the witness.

THE COURT: It does.

BY MR. PENN:

Q Just tell us what the number is.

THE COURT: The objection is sustained.

THE WITNESS: The number is $171,064.

MR. ELLINGTON: Your Honor, I'm going to object to that number. There is absolutely no foundation in this case to establish any liability, and this witness cannot testify to that.

THE COURT: I think that is correct.

MR. PENN: Your Honor, that's ignoring the testimony of Miss Martin (sic) yesterday, who laid the foundation for this.

THE COURT: I did not hear him mention any figures of any kind.

MR. PENN: During her testimony?

THE COURT: Yes. I do not recall that.

MR. PENN: I believe she did, Your Honor. I could be wrong.

THE COURT: I think you are.

[IV-53] MR. PENN: Okay. I know Mrs. Murphy spent a considerable amount of time talking about the Quebec sales tax.

THE COURT: I remember his testimony about that. He never mentioned any figure.

Go on to the next question.

MR. PENN: May I consult with co-counsel, Your Honor?

THE COURT: All right. Let's move this along, shall we?

MR. PENN: Your Honor, I would like to revisit the QST issue. Can we, at sidebar?

THE COURT: No, no. Go on with the – whatever objection you have, state it.

BY MR. PENN:

Q Okay, Mr. Ryan, your next item is damages on new car sales.

A Yes, sir.

Q And what does that cover?

A That covers specifically the margin on new car sales for the year 2001.

Q Okay. And what was that amount?

A The amount is $940,384.

Q Then with your next item is lost sales of new cars.

A Yes.

[IV-54] Q And what does that cover?

A That covered ongoing loss of profits on the sale of new cars for the years 2002 through 2005.

Q And how did you calculate that?

A I calculated that using 2001 as a base year and anticipating a percentage increase, not only in volume, but in average selling price.

Q Okay. And what was that number?

A That number is $5,463,108.

THE COURT: What is it? That is not what I have here.

MR. PENN: Again –

THE WITNESS: Item seven.

THE COURT: Item number seven –

THE WITNESS: 5,463,108.

THE COURT: All right, yes.

BY MR. PENN:

Q The next item, number eight, is profits on parts sales for 2001 through 2005?

A I can't be absolutely – yes, 2001 through 2005 in the amount of 1,355,229.

Q How did you arrive at that figure?

A Again, that was based on a base year parts sales number increased by a percentage factor to allow for volume and price increases.

[IV-55] Q Okay. And then the last item you have on this list is the delivery of refused eighty-two cars that were not delivered.

A Yes. And the amount is –

MR. ELLINGTON: Objection, Your Honor. This claim is not part of the case at this point, and we object to the inclusion of any damages on this issue.

THE COURT: Sustained.

BY MR. PENN:

Q Also as a part of your report, did you do an evaluation of the value of Club Car (Quebec)?

A Yes, I did.

Q And how did you do that calculation?

A Based on –

MR. ELLINGTON: Your Honor, I'm going to object. There's nothing in this report in the summary about the valuation of Club Car (Quebec).

MR. PENN: Your Honor, I refer you to page 4 of the report which states, "A revised sales volume would be $3,563,548," and based on this –

THE COURT: Wait a minute. You said page 4?

MR. PENN: Page 4.

THE COURT: What finding are you referring to?

MR. PENN: I'm referring to the middle paragraph at the top of the page, that sentence that begins, "A [IV-56] revised sales volume would be," and he provides a number. "Based on this, the company would have had an estimated market value of . . . "

MR. ELLINGTON: Your Honor, I'm going to object to his testifying to that figure

THE COURT: That is what it says.

MR. ELLINGTON: But, Your Honor, it's not part of the summary of conclusions and damages.

THE COURT: It is part of his report. I will allow the question.

BY MR. PENN:

Q Mr. Ryan, how did you calculate the value of the business?

A Based on an analysis I had prepared of the annual sales volumes of new and used cars, and again, my opinion – an appropriate valuation technique, considering the synergies that would be involved in similar businesses, I used a factor of 75 percent of the average of the last three years' sales.

Q Okay. You said – you refer to an evaluation technique. Are there other ways to value businesses?

A There are virtually hundreds of different techniques for valuing businesses.

Q And have you, indeed, valued businesses with various different techniques over the years?

[IV-57] A I have been involved, over the course of my business career, on both sides of negotiations for purchasing or selling a business and determining, through negotiations, appropriate value.

Q Why did you chose [sic] this particular technique to value CCQ?

A It was the simplest and most straightforward and I think the most appropriate way of evaluating the company.

Q Why do you think it's the most appropriate under the circumstances?

A Where the potential acquirer was in a similar business and where their records were not available to me, it was not possible to calculate the economies and synergies that they would benefit from.

So it would appear appropriate that if you acquired this business, that it would be pure add-on gross margins, that any additional sales would generate profits which would drop straight to the bottom line.

And, therefore, this was an appropriate technique.

Q Okay. And you used a calculation of 75 percent of the average three year sales volume?

A Yes, sir.

Q What was the average sales volume for CCQ?

A That is –

Q What was the number?

[IV-58] A The number that is in my report is the average annual sales, which was $3,341,182.

Q And what about the revised sales volume number? Do you see what I'm referring to below that one (indicating)?

A Yes, a revised sales volume would be $3,563,548.

Q What do you mean by a "revised sales volume number"?

A The annual sales number, in my opinion, had been depressed because of the competitive pressures.

And I felt it was appropriate to increase the gross sales numbers by a percentage of 6.24 percent.

Q So you increased the sales volume by about 6 percent?

A That's correct.

Q And then you applied this calculation. And what number did you arrive at for the value of the business?

A I arrived at a value of the business of $2,672,661.

Q Quickly, I want to go back to your summary and conclusions, your number four item that we talked about.

A Yes.

Q That particular number, the $201,100, that was in U.S. dollars?

A Yes, it is.

MR. ELLINGTON: Objection, Your Honor. You have ruled that out before.

MR. PURCELL: That's my same objection, Your Honor, you did.

[IV-59] MR. PENN: We had a sidebar on that, Your Honor.

THE COURT: His contention is that it's applicable against Champigny and that he concedes that the ruling was not applicable to Club Car.

MR. ELLINGTON: Thank you, Your Honor.

BY MR. PENN:

Q And that number – are all of the other numbers in your report in Canadian dollars?

A Yes, they are.

Q So that particular number would have to be converted?

A Yes, sir.

Q How do you convert –

THE COURT: That is a matter for the Court to determine.

MR. PENN: Thank you, Your Honor.

BY MR. PENN:

Q All right. Now I want to talk to you a little about – it has already been raised – your relationship with the Murphys.

How long have you known the Murphys?

A Since 1966.

Q And do you consider them friends?

A Yes, I do.

Q Do you have a personal relationship with then [sic]?

A Yes.

[IV-60] Q Have you also had a business relationship with them?

A Yes.

Q How long has that business relationship lasted?

A I would say our business relationship probably started in 1970 or '71 and has continued since then.

Q And does the fact that you have a personal relationship with the Murphys, that you've known them for a number of years, have any affect on your objectivity in reviewing the information in this case?

MR. ELLINGTON: Objection, Your Honor.

MR. PENN: That's not a leading question, Your Honor.

THE COURT: It is an improper question. Go ahead and ask another.

BY MR. PENN:

Q Let's talk a little bit about – there has been discussion in this case about financial statement year-end numbers for CCQ. And numbers for the years 1996, 1997, 1998, and 1999 were put on the board.

During those years, did you have a financial involvement with CCQ on a professional basis?

A I would have acted as Mr. and Mrs. Murphy's financial business advisor in those years, yes.

Q During that time, would you have reviewed financial statements?

[IV-61] A Yes.

Q Would you have? And reviewed tax returns?

A I might have reviewed them. I was not preparing them at that particular point in time.

Q And there were numbers that were discussed – I think in '96, there was a loss; I think in '97, there was forty thousand dollars: in '98, thirty; in '99, forty something – in the mid thirties to forties as far as financial statement numbers.

Can you tell us how those numbers are arrived at for CCQ?

A Those numbers would have been arrived at by applying generally accepted accounting principles, charging out depreciation, including expenses of the fur business and any losses arising from there.

Q Do those numbers have any affect on the value of the business?

A They would be a factor in considering the value of the business, but they wouldn't be the primary basis, no.

Q Would you use those numbers in calculating the value of the business?

A They would be one factor, depending on the method that you chose.

Q And I want to talk a little bit about – there has been some testimony that you had been in a few meetings with the [IV-62] Murphys.

A Yes.

Q And Club Car was also involved in those meetings?

A Yes.

Q How many meetings do you remember going to?

A I remember specifically only three occasions.

One – the first meeting would have been December '98 or January '99 with Mr. and Mrs. Murphy, Mr. O'Brien, and I have forgotten the other gentleman's name.

Q Tell the ladies and gentlemen of the jury what you remember about that meeting?

MR. ELLINGTON: Your Honor, I would ask at this point an instruction because he is obviously not testifying in any expert capacity at this point regarding these meetings that he participated in.

THE COURT: He is just a witness, yes. And that is true. He is not testifying as an expert with respect to what occurred at that time.

Go ahead. Let's get through with this witness.

MR. PENN: All right, sir.

THE WITNESS: The first meeting was specifically to discuss the mechanics and the possibilities of splitting the Quebec territory.

BY MR. PENN:

Q Okay. Let's talk about the April 2000 meeting. Did [IV-63] you attend that meeting?

A Yes, I did.

Q Tell us a little bit about that meeting.

A Mr. Murphy, prior to the meeting, had received a registered letter from a Mr. Hooper in Ontario confirming the date of the meeting to discuss their ongoing relationship, I believe was the general tone of the letter.

Mr. Murphy asked me, in my capacity as his business advisor, if I would go to that meeting, which I did.

The meeting was not what I think any of the three of us had expected. In fact, there was a great deal of dialogue and credit concerns and whatever that had not been raised prior to the meeting, which I think were satisfactorily addressed.

Q Let me stop you right there.

At that time, did you have knowledge of the financial condition of CCQ?

A I had an ongoing and constant exposure to the financial position of CCQ, yes.

Q And during that meeting, were there any conditions given for the distributorship?

A Mr. Dakuras indicated that he thought the current six month contract was probational. That had never been communicated to the Murphys, to my knowledge.

And there was – there were undertakings given by the [IV-64] Murphys in response to items that were discussed at that meeting.

And the meeting terminated on the point that Mr. Dakuras or Mr. Hooper were to provide the Murphys with a list of outstanding items which could then be dealt with at a later date.

Q After that meeting, did you have another meeting with Mr. Murphy and Club Car?

A Subsequent to the April meeting, Mr. Murphy and I met Mr. Hooper in Cambridge, Ontario, which is the head office for the Ontario distributorship.

Q What was discussed at that meeting?

A We discussed specifically the problems of competing with new cars versus virtually identical one year old cars.

We talked about the level of orders and the sales quota, the fact that the one year old cars were not a problem in the Ontario market because they were not sold in the Ontario market.

And we discussed, in general – lots of general business terms, how to try to increase the number of new cars that Mr. Murphy could sell in the Province of Quebec.

Q Okay. After the April meeting, was there ever a letter sent by the Murphys or Mr. Murphy to Mr. Dakuras or anyone else at Club Car?

A Yes. There was a letter sent after the April meeting [IV-65] by Mr. and Mrs. Murphy, which, as their business advisor, I reviewed. And in fact, I recommended that they write that, which laid out in some detail exactly what had transpired in terms of what Mr. Dakuras had referred to as credit problems and slow payment and, I thought, adequately explained and verified exactly what had taken place.

Q Did you help put that letter together?

A Yes, I did.

Q And it was dated May 8th of 2000 to Mr. Dakuras. And it says:

> During our recent meeting, you mentioned that there had been concerns expressed about our credit and payment history. We have now completed a review and the account has been fully paid.

Was that – is that your understanding of the financial concerns that were raised at the April 2000 meeting?

A Yes.

> Q In the interest of fairness, I believe the following information should be taken into account.
>
> In the fall of 1998 Club Car (Quebec) was indebted to Club Car International in the amount due of $510,000. By March of 1999, the amount had been reduced to $214,000 and [IV-66] at your request, we signed a promissory note in that amount due November 1st, 1999. In August 1999, this amount was reduced to $102,500 by applying credit notes and this amount was paid

in full on time. Interest on the outstanding balance was paid monthly during the term of the note.

All parts ordered during the 1999 season were processed on a COD basis and although inconvenient for us, we understood the necessity and believe that there were no major problems in this area.

For 1999, Club Car International and Club Car (Quebec) agreed that purchases were to be floor planned through Newcourt. In September 1999, having heard nothing from Newcourt, we contacted Treasury to see if they had any information relative to these transactions. The result of our inquiry was a memo to Anita from Connie Edwards dated October 7, 1999, which said, in part: "Due to an administrative billing error, these transactions were not booked with Newcourt and are currently on your Club Car account."

The invoices listed in this memo totaled [IV-67] $800,000 of which $730,000 was past due. Four of the five invoices were originally billed to Newcourt and only the most recent was invoiced to us. We can well understand how an overdue amount of this magnitude would raise concerns in the Credit department, but in our defense, we were never contacted about any overdue invoices.

By December of 1999, all outstanding invoices except for one had been paid in full. The last invoice was held pending processing of credit notes. In February of 2000, we paid $80,000 on account and after an exhaustive review, the account was finally settled by processing $120,000

of credit notes and approximately $53,000 of additional invoices. The long delay in resolving outstanding credit notes was a function of the number of credit notes and the period covered.

As a privately-owned company, our financial statements are prepared with specific objectives in mind. Hopefully, the credit agreement, which has been signed, will satisfy any credit concerns.

[IV-68] Please extend to Angie Arnold, Connie Edwards and all their staff our appreciation for their efforts in resolving all these outstanding issues.

Did you ever hear any response to that letter?

A No.

MR. PENN: Thank you.

CROSS EXAMINATION

BY MR. ELLINGTON:

Q Good morning, Mr. Ryan.

A Good morning.

Q Mr. Murphy has been a very close friend of yours for thirty-five plus years; is that right?

A Yes.

Q In fact, you and Mr. Murphy were curling buddies, weren't you?

A Yes.

Q Curling is a sport that's very popular in Canada, isn't it?

A Yes.

Q In fact, you have worked together over the years; is that right?

A In my role as a financial advisor for Club Car (Quebec) and their companies, yes.

Q You have traveled together before, correct?

[IV-69] A Yes.

Q You are the godfather of the Murphys' daughter, aren't you?

A Yes.

Q You, in fact, have been in constant touch and communications with the Murphys for thirty-five years?

A Yes.

Q You have vacationed in Europe together with them, haven't you?

A In 1976, yes.

Q You traveled to Cape Cod together, haven't you?

A Yes.

Q You've shared a Laurentien cottage together, haven't you?

A In the early years, yes.

Q Gone to Las Vegas together, haven't you?

A Yes.

Q You and Mr. Murphy always play golf together?

A When the occasion presents itself, yes.

Q You see the Murphys on a very regular basis, don't you?

A When we can. I'm located in Oakville, and they are in Montreal.

Q But you speak to the Murphys a minimum of twice a week, don't you?

A I wouldn't say a minimum of twice a week. Certainly [IV-70] over the last two years, we've been more in regular communication.

Q You wouldn't say a minimum of twice a week?

A I would say in the last two years, we certainly have. But that is more involved with this case than with our personal relationship.

Q You indeed are best friends with Mr. Murphy, aren't you?

A Yes.

Q You have given Mr. Murphy advice on legal documents, haven't you?

A I've given him business advice, yes.

Q On legal documents, correct?

A On documents he presented to me and asked me for my opinion.

Q Legal documents.

Now you went to this April 8, 2000 meeting at the request of the Murphys, didn't you?

A Yes, I did.

Q Okay. You weren't specifically invited by anybody from Club Car, were you?

A No.

Q And the subjects that were discussed at that meeting included the market share numbers of CCQ; is that right?

A No.

[IV-71] Q That's not right?

A We didn't talk about market shares specifically, no. We talked about specific sales numbers in terms of number of new cars sold.

Q Well, Mr. Ryan, let me direct you to your first deposition in this case, which, I believe, is dated May 9th of 2002.

At page 89, line 17, in your answer to the question regarding the input into the business or marketing plan that was discussed at that meeting, you made the statement, "The situation market share was discussed."

Do you remember making that statement to me at your deposition?

A Yes. Okay. I apologize. I thought you were referring to a percentage market share, which we did not discuss. But we certainly discussed it at some length in an attempt to determine what the market share was because those statistics were not available at the meeting.

Q And you also discussed at that time that the six month contract, distributor agreement, that was in effect at the time, was a probational agreement; is that right?

A That was Mr. Dakuras' position, yes.

Q And service issues involving CCQ were discussed at that meeting; is that right?

A A couple of minor service issues were discussed, yes.

[IV-72] Q The location of CCQ's warehouse was discussed at that meeting, wasn't it?

A Yes.

Q CCQ's facilities were discussed at that meeting?

A Yes.

Q And then you were at that May meeting in Cambridge, is that right, May of 2000?

A That's correct.

Q And, again, you were invited to that meeting by Mr. Murphy, is that right?

A Yes, I was.

Q And previously, you had been in a meeting sometime in late '98 or early '99 where Ray Bentley and Dan O'Brien were present along with Mr. and Mrs. Murphy; is that correct?

A Yes. Thanks for reminding me of his name.

Q And you were at that meeting?

A Yes, I was.

Q And you were not invited by anybody at Club Car; is that right?

A That's correct.

Q But you came to the meeting at the request of Mr. Murphy?

A Yes, I did.

Q Now, Mr. Ryan, you have done accounting for Club Car (Quebec) previously; is that right?

[IV-73] A Yes.

Q Okay. You've done accounting work for a new corporation called Golf Cart Quebec, haven't you?

A Yes, I have.

Q And you did accounting work for Golf Cart Quebec in the year 2000, didn't you?

A Yes.

Q Now your work with Golf Cart Quebec, the new corporation, has been in the same capacity as what you did for Club Car (Quebec), hasn't it?

A More or less, yes.

Q And you are Golf Cart Quebec's business and financial advisor regarding transferring assets from CCQ to Golf Cart Quebec; is that right?

A To be more specific, there were assets which were sold and purchased, as opposed to transferred.

Q You were –

A I'm aware of that transaction.

Q And you were Golf Cart Quebec's business and financial advisor regarding that movement of assets; is that right?

A I don't recall specifically dealing with that transaction. But I would say yes, if I was their business advisor, we would certainly have talked about the new company purchasing certain assets from Club Car (Quebec).

Q So you would agree with me that you operated as a [IV-74] business and financial advisor regarding that transaction?

A Yes.

Q Okay. And in that role, you concurred with the Murphys' plans to set up a separate company because of this litigation we're involved in right now, didn't you?

A They asked me if I thought it was appropriate to set up a new company, and I said yes.

Q You concurred with that. And your advice was to operate a separate company under a separate corporate umbrella with this litigation in process; is that right?

A Yes.

Q And the reason being for the purposes of a limited liability; isn't that right?

A Corporations have limited liability, yes.

Q And that's the reason why, correct?

A I wouldn't say that's the only reason.

Q But that is a reason why?

A That would be one of the reasons, yes.

Q And you concurred with that for the purpose of limited liability, giving that business advice?

A I concurred with Mrs. Murphy setting up a new company, yes.

Q For that purpose, correct?

A There were several purposes.

Q That's one of the purposes?

[IV-75] A That would be one of the purposes, yes.

Q And you have also operated as a litigation consultant to the Murphys in this case, haven't you?

A Yes.

Q And in the earlier stages of this particular litigation, you've given advice to the Murphys in your capacity as a business advisor, haven't you?

A I would do that on an ongoing basis.

Q So the answer was "yes" then?

A Yes.

Q Now you've never testified as an expert witness before; isn't that what I heard earlier?

A That's correct.

Q Your only background in the golf industry has been your particular relationship with CCQ; is that right?

A Quebec is a very small market. Yes, that's my experience.

Q You don't have any other background in the golf industry other than playing golf, do you?

A I have served on the board of directors with a couple of golf clubs. I'm familiar with the operations and the processes that go on in renting, leasing, and buying cars.

Q But you don't have any other golf distributor as a client other than CCQ?

A There aren't too many golf distributors in the Province [IV-76] of Quebec.

Q So the answer is "no"?

A The answer is "no."

Q Now you've had some experience in the film industry; isn't that right?

A That's correct.

Q And you've been involved in supervising or dealing with production partners with several movies and TV shows, haven't you?

A Yes.

Q One of those would be something called "A Savage Place"?

A I don't recall that.

Q You don't recall "A Savage Place"?

A No, I don't.

Let me see. If I can, let me show you your resume that has been provided, a CV.

MR. ELLINGTON: If I may approach the witness, Your Honor?

BY MR. ELLINGTON:

A [sic] And is "A Savage Place" listed as one of the particular items here?

A Yes, it is. I recall that movie now. Thank you.

Q And you also were involved in something called "Judas Goat;" is that right?

[IV-77] A Yes.

Q And a particular production called "The Quarrel"?

A Yes.

Q And "Prom Night III"?

A Yes.

Q Now, Mr. Ryan, in this case, it's my understanding that you are going to be charging a fee for your services; is that right?

A Yes, it is.

Q And that fee is going to be somewhere between zero and twenty-five thousand dollars, but that fee hasn't been determined, has it?

A Yes, it has.

Q It has been determined?

A Yes.

Q Okay. Well, when I deposed you back in, I believe, May of 2000 – sorry – May of 2002, I asked you –

MR. ELLINGTON: I'm at page 23 of the deposition.

BY MR. ELLINGTON:

Q I said:

> Have you determined to charge a flat fee of twenty-five thousand dollars, or is that a maximum fee?
>
> You answered: That's a maximum.

Is that right?

[IV-78] A At that point in time, that was correct, yes.

Q And then my next question is:

> Might your total fee be less than that?
> And you said: It might.

A At that point in time, that was correct, yes.

Q And I asked you how you would so calculate.

And your methodology – your answer was, "Well, that would be between myself and my conscience;" is that right?

A Yes.

Q Mr. Ryan, you have not operated as the accountant for CCQ for some number of years, have you?

A Can you clarify what you mean by "operate as the accountant"?

Q Well, you have not been CCQ's accountant since 1986, have you?

A Actually, I have been CCQ's accountant since 1999. I think 1999 was the last year Mr. Despatis prepared the financial statement.

Q Well, Mr. Ryan, I asked you – do you remember your deposition which was in – I believe this was in Toronto in June of 2002. Do you remember that deposition?

A I do.

Q That was the deposition in which you were sworn in and swore to tell the truth, right?

A That's correct.

[IV-79] Q And I asked you at that point, I said:

> Let me just question you.

You provided an answer:

> Regarding – for a period of time the accountant for Mr. Murphy – during my overseas trip, which was '74 to '76, and then we reestablished our relationship on my return.
>
> And then you said: Beginning at some point after moving to Toronto from Montreal in 1986, he recommended to Murphy that he employ a local accountant, which he did.

Do you remember that testimony?

A Yes, I do.

Q And I asked you:

> Who was that, to your knowledge? And you said: The gentleman's name was Jacques Despatis.

And my question: His firm is Despatis and Associates?

Your answer was: I believe that's correct.

Is that right?

A Yes.

Q And my question is, I said:

Okay. Mr. Despatis and Associates [IV-80] became involved as Club Car (Quebec)'s accountant. Did you have any further role as Club Car (Quebec)'s accountant?

Your answer was: Not as their accountant, no.

Do you remember that answer?

A If you're reading the transcript –

Q I'd be happy to show it to you.

A I'm not doubting it. And I would have answered at that particular point in time, had I prepared any financial statements or tax returns for Club Car (Quebec). And the answer would have been no, I had not acted in that capacity.

Q And Despatis and Associates is a reputable accounting firm in Canada; is it not?

A I believe they are reputable.

Q Now –

MR. ELLINGTON: Your Honor, if I can have just a moment to set up the easel.

BY MR. ELLINGTON:

Q Now, Mr. Ryan, you have provided a report that I believe you have in front of you today; is that right?

A Yes.

Q And in this report, you make a specific assumption at the beginning of the report that the Club Car (Quebec) was an exclusive distributor in the Province of Quebec for Club [IV-81] Car; is that correct?

A For new cars and new parts, yes.

Q And that's a specific assumption that you have made for the purposes of your report, correct?

A Yes.

Q Now, Mr. Ryan, let me show you a document which has previously been admitted into evidence as Plaintiff's Exhibit 1.

Can you see that?

A Nope.

Q All right. Let me provide you, if I can, with Plaintiff's Exhibit 1 here, which is the same document, but should be a little easier to read.

And you would agree with me, would you not, if you look at paragraph two, this agreement specifies that Club Car (Quebec) is granted non-exclusive right to market the product within the territory.

Do you agree with that?

A That would be the wording in this document.

Q Do you agree with that, sir?

A You're asking me – you objected originally to me giving a legal opinion. You're asking me to comment on a legal document.

I don't think I'm qualified to give that opinion.

Q So you're not qualified to give an opinion as to [IV-82] whether or not the relationship between CCQ and Club Car was either an exclusive or non-exclusive arrangement?

A Based on my review of the website and the fact that my knowledge –

Q Mr. Ryan, yes or no?

A You're asking me whether or not I will give a legal opinion on a legal document. I'm not qualified to do that.

Q You're not qualified to state whether this a non-exclusive agreement?

A No.

Q All right. And in paragraph 18 of this agreement, it says, "Agreement, non-exclusive."

Have you reviewed that as part of your opinion in this case?

A I would have reviewed the distributorship agreement as part of my opinion.

Q And after reviewing the distributorship agreement, you came up with the conclusion that is the basis of your expert report that Club Car (Quebec) is an exclusive distributor; is that right?

A I reached that conclusion after reviewing this document, amongst many others, yes.

Q And you agree with me that this says "Agreement, non-exclusive" here?

A I'm agreeing with you what it says, yes.

[IV-83] Q How long did this particular distributor agreement last?

A This particular agreement became effective on March 1st, 2000 and expired on September 1st, 2000.

Q All right. So this agreement would only last until its end date of September 1, 2000; is that right?

A Based on what is written.

Q Now your report is based upon CCQ being, as you define it, an exclusive distributor in Quebec, correct?

A Yes.

Q And if CCQ was not an exclusive distributor, that would change your opinion, wouldn't it?

A It might affect my opinion in some way, yes.

Q And your report here – you have – is based upon your review of CCQ's financial statements; isn't that right?

A In part, yes.

Q And some of the extrapolations that you have made in your report have been based upon gut instinct, haven't they?

A A certain amount of business judgments, if you prefer that term.

Q Well, I'm going to use that term because – do you recall giving me that term in response to a question in your deposition?

A I would have used it. And it's a commonly used term. It may not be what you would use, but it is what I used at [IV-84] that particular point in time.

Q And some extrapolations you made were based upon what you described as a "shot in the dark;" isn't that right?

A I don't recall using that expression specifically.

Q If I can, let me direct you to your deposition dated June 3, 2002, at page 167, line 24. At that point, I asked you a question:

> Where did you get the six hundred dollar figure from?
>
> Answer: It's a shot in the dark.

Do you remember that?

A If I can ask for a clarification, the six hundred dollars was relative to what?

Q I believe it was with respect to parts packages.

A At that particular point in time, a significant volume of documents had not been produced, and we did not have any information on the parts packages at that point in time.

So at that point in time, for a preliminary report, it was, in fact, our best estimate, or a shot in the dark.

Q And in reaching some of the conclusions in your report, you have made the assumption that CCQ would have bought every used car that EPC purchased; isn't that right?

A Yes.

Q And if that's not the case, then that would change your opinion, wouldn't it?

[IV-85] A If the facts that I had assumed are not the case, then it would affect my opinion.

Q And that would affect your ultimate conclusion, correct?

A It could affect it up or down, yes.

Q And you've assumed, as part of your report, that every car that EPC, Equipements Pierre Champigny, sold in 2001 was the result of CCQ's sales and marketing efforts; isn't that right?

A Barring any information to the contrary, yes.

Q If that is not the case, then that is going to change your opinion and conclusions, correct?

A I have already stated that if the facts change, the conclusions would change.

Q And you have made an assumption in your report that no other distributor is treated like CCQ, haven't you?

A I don't know that I reached that conclusion. I said no other distributor was treated like CCQ?

Q Well, you make a statement – I am currently on page 2 of your report.

You say that no – let's see – you say you have never seen a situation where used product was unloaded from corporately owned territories into those of independent distributors.

Do you remember making that statement?

[IV-86] A Yes.

Q That was one of the assumption you made in reaching your conclusion?

A I said I had never seen it. I didn't say that CCQ was treated like no other distributor.

Q All right. Well, if used cars – or parts packages were sold in other distributor territories, that would change your opinion, wouldn't it?

A It might.

Q Now in reaching your opinion here, in this report you have provided, you have said – or you've assumed that the relationship between Club Car and CCQ was going to continue indefinitely, in perpetuity; isn't that right?

A Based on their sales performance, yes.

Q And you have said in your report that that relationship would extend for ten or twenty years. That's an assumption?

A I couldn't foresee terminating – based on the information available to me – was quite a successful arrangement.

Q And, Mr. Ryan, if, indeed, the relationship between Club Car and CCQ were limited to a specific period of time, such as reflected in this distributor agreement, that would significantly affect your opinion, wouldn't it?

A I've already testified that as the situation and facts changed, then my conclusions might well change.

[IV-87] Q So your answer would be yes?

A If the facts changed, yes.

THE COURT: Would the jury like a break at this time?

(Jury out at 10:58 a.m.)

THE COURT: All right. Ten minutes, Marshal. (Recess at 10:59 a.m. until 11:11 a.m.)

THE COURT: Go ahead, Mr. Ellington.

MR. ELLINGTON: Thank you, Your Honor.

BY MR. ELLINGTON:

Q Mr. Ryan, there have been a number of documents that have been admitted into evidence. These are CCQ's financial statements over the period of 1993 through 1999 which were prepared by Despatis and Associates.

Have you reviewed those financial statements as part of your financial report?

A I don't believe so.

Q You haven't reviewed those. All right.

Let's – this is the same Despatis and Associates that you recommended that CCQ retain as its accountants?

A I did not recommend it, no.

Q You did not make that recommendation?

A No, I didn't. I recommended they employ someone locally. I didn't recommend a specific firm.

Q I'm sorry. I think I recall a little differently. I [IV-88] think we went over some testimony earlier where I had asked you, and you had responded, at some point,

after moving to Toronto, you recommend to Mr. Murphy to employ a local accountant.

And I asked you: Who was that?

And you said: The gentleman's name is

Jacques Despatis.

Is this –

A That's correct. I know who it is, but I didn't recommend him specifically.

Q Okay. Very good. But to your knowledge, this is a reputable accounting firm?

A To my knowledge, yes.

Q Now these financial statements represent a period of time – actually, I think we can gather some information starting in 1992 for the business of CCQ, which for 1992, had a net income – actually a net loss of $4,849.

In 1993, a net income of $26,339.

In 1994, I believe it's $27,547.

And in 1995, $111,395.

In 1996, a loss of $46,267.

In 1997, net earnings of $43,940.

1998, net earnings of $1,365.

In 1999, net earnings of $33,567.

And these are exhibits which have been admitted into [IV-89] evidence as Exhibits 107 through 113.

And the total, as I come up with it over that period of one, two, three, four, five, six, seven, eight years is $193,037.

Mr. Ryan, let me let you take a look at these financial statements, which have been marked as 107 through 113, and ask you to take a look at those and confirm for us that these, indeed, are the net earnings numbers over that eight-year period.

A They would appear to be correct.

Q All right. And so over that eight-year period, there is a total net income for the business, CCQ, of a little less than two hundred thousand dollars, and you are now claiming that the total damages in this lawsuit to CCQ is $10,464,000; is that right?

A That's correct.

Q Mr. Ryan, you had a preliminary report in this case when I deposed you back in June, in which you had calculated damages of $2,700,000; is that right?

A I don't have the preliminary report in front of me.

Q I would be happy to show it to you.

MR. HARRIS: If I may approach, Your Honor?

BY MR. ELLINGTON:

Q Is this the preliminary report of Peter Ryan, which was marked as Exhibit 215 to your June deposition?

[IV-90] A It would appear to be.

Q And the total bottom line damages you calculated then, could you tell us what that number is?

A At that point in my preliminary report, which was subject to subsequent production of documents and further work, the total damages identified to date were $2,728,583.

Q If I could have that back, sir? Thank you.

Now in your summary and conclusions there in your report, you are calculating out certain damages three, four, five years into the future, aren't you?

A Yes.

Q Lost sales of new cars is $5,400,000. That's going up through 2005, isn't, it?

A That's correct.

Q Profits on parts sales going up through 2005, $1,355,000; isn't that the figure you reached?

A Yes.

Q And you would agree with me that the term of this distributor agreement, which is marked as Exhibit 1 in this case, expired on September 1, 2000, didn't you?

A That's what the contract says apparently, yes.

Q Are you aware of any contract or distributor agreement entered into between Club Car and CCQ for a period of time longer than one year?

A Not that I am aware of, no.

[IV-91] Q And, Mr. Ryan, you would agree with me that transferring the assets out of a business would negatively affect the valuation of that business, wouldn't you?

A That would depend on the nature of the assets that were transferred and the nature of the business subsequent.

Q Well, let's assume we have a widget distributor. And the widget distributor has assets of – we'll just pick a number of a hundred thousand dollars.

And the widget distributor transfers a hundred thousand dollars of assets to a separate company that manufactures digits.

Now when you transfer that money from the widget distributor to the digit distributor, that's going to negatively impact the valuation of the widget distributor, isn't it?

A No. You will have to bear with me because digits and widgets – I think you said widgets.

Q Well, widgets is the first one and – I studied economics and –

A It would depend entirely on what course of business action the widget manufacturer chose to undertake and what they did subsequent.

In any event, items or events that have happened will affect the company one way or the other, subsequently.

Q Now the letter that you wrote, which I believe is [IV-92] Exhibit 115.

THE COURT: That is Plaintiff's exhibit?

MR. ELLINGTON: Yes, Your Honor. Plaintiff's Exhibit 115. I'm doing my best – any exhibits that I refer to, I'm doing my best to refer to the number. If I use a Defendants' exhibit, I will endeavor to use that.

BY MR. ELLINGTON:

Q But for benefit of our record, Plaintiff's Exhibit 115 is a letter dated May 8, 2000. And this is a letter that you drafted; is it not?

A It is a letter I helped draft, but I didn't write the letter.

Q You didn't write the letter.

Well, let's look at it here. The fax cover page – do you see this fax cover page on this letter

A Yes.

Q And it's from Cumbermore Consults, Inc. in Oakville. That's your business; is it not?

A Yes, it is.

Q And this is a fax directed to W. Dakuras, dated 5/8/00?

A Yes.

Q And you're saying you didn't prepare this letter?

A I said I helped in preparing the letter.

Q And that was a specific letter that went to Mr. Dakuras at Club Car prior to when this particular litigation ensued, [IV-93] right?

A What was the date on the letter?

Q May 8 of 2000.

A I believe that was prior to the litigation, yes.

Q And a couple of months later, after Mr. Murphy learned that he was not going to be offered a new distributor agreement, Mr. Murphy told you that he intended to bring suit against Club Car in Quebec, didn't he?

A Yes, he did.

Q And he said he intended to move with alacrity and speed, didn't he?

A I doubt those are Mr. Murphy's words. They are more likely my words and my interpretation of what he said to me, yes.

Q So you wouldn't disagree with the notion that he intended to move with alacrity and speed, would you?

A I would have been surprised if he hadn't under the circumstances.

MR. ELLINGTON: Your Honor, if I could have just a moment to consult with co-counsel?

(Pause)

MR. ELLINGTON: Your Honor, I don't have any further questions for Mr. Ryan.

THE COURT: Are you ready, Mr. Purcell?

MR. PURCELL: Yes, Your Honor.

[IV-94] THE COURT: Go ahead.

CROSS EXAMINATION

BY MR. PURCELL:

Q Mr. Ryan, the numbers you have already given the jury and the eight items you have talked about are all gross sales and gross profit numbers, weren't they, sir?

A Yes.

Q They did not consider that the business, in generating those sales and in generating those profits, would have any expenses whatsoever, did they, sir?

A No.

Q As a matter of fact, when you looked at the lost sales on one year old cars from '97 to 2000, you just considered that those were profits that Mr. Murphy or CCQ would be able to book into its bank account, didn't you?

A I made the assumption that incremental sales would fall directly to the bottom line, yes.

Q And similarly, you made the assumption that there would be no increase in the sales force in order to achieve a sales projection of over $5 million; isn't that right, sir?

A Can you direct me to –

Q Yes. That's number eight, or item number seven, the lost sales on new cars. You said over $5 million – you can generate gross sales of that amount of money and no additional cost, by virtue of your report, didn't you, sir?

[IV-95] A What I said specifically was that is a gross margin, and that is spread over five years. So the sales number would be sales would be –

Q It's spread over five years and it's margin – that's like over $20 million in sales in that time frame, isn't it sir?

A Yes, it is.

Q That would mean you would get a gross margin. When you tell the members of the jury that you're going to get a gross margin, you're saying to the members of the jury that the product is going to cost about $25 million – I beg your pardon – it's going to cost about $20 million, and you're going to be able to sell the product for about $25 million.

And you're going get a margin of around $5 million; isn't that what you're saying, sir?

A The margin number is the number that is included in my report, yes.

Q So that means that the business that you're talking about would have achieved a level of sales activity never witnessed in twenty years, doesn't it?

A Yes.

Q And it also means that it's going to put that $5 million directly into its pocket or its bank account without having to account for any expenses related to that $5 [IV-96] million; isn't that right?

A That's what's in my report, yes.

Q That's what I'm asking you about. The same thing about parts packages of over a million dollars; is that right?

A Yes.

Q So you have not considered in your analysis at all the concept of business earnings, have you?

A I have not taken into account any incremental or administrative expenses, no.

Q So we will all be clear about what your opinions include and what they don't include, you did not take earnings of the business before the effect of any activity that you claim injured the company; you did not take that into account, did you, sir?

A Can you repeat the question?

Q Certainly. I'll try to do a better job this time.

A I apologize. I'm a little – trying to stay with you.

Q I hear you.

You did not consider earnings before the trial had the company not been affected at all by Club Car or EPC? You didn't consider that in your report, did you?

A To the extent that I reviewed financial statements or financial results at either a gross or net profit basis, I would have taken it into account.

But I can't be more specific than that.

[IV-97] Q But that's not the number you're presenting to this jury. The earnings number of this company, had

these effects not occurred, you didn't present that to the jury, did you, sir, in your direct testimony?

A If it's not in my report, I didn't present it.

Q And similarly, you did not subtract from that number the actual earnings numbers of CCQ before trial, did you, sir?

A I don't know why I would do that.

Q Similarly, you did not add any prejudgment interest to get damages before trial, did you, sir?

A No, I did not.

Q And then you did not project earnings after trial had CCQ had these effects not occur, did you, sir?

A No, I didn't.

Q And you did not subtract the projected earnings after trial and did not discount any numbers, did you, sir?

A Can you be more explicit?

Q Sure. None of these numbers are discounted to present value, are they?

A No, they're not.

Q And none of these are projected earnings subtracted after trial, are they, sir?

A No.

Q In that way, you did not attempt to calculate damages [IV-98] after trial, did you, sir?

A No, I did not.

Q And you did not attempt to add any earnings damages before trial or any earnings damages after trial to reach a total damages calculation based on earnings, did you, sir?

A I'm sorry. You'll have to slow down.

Q What I'm saying is you didn't take that first number I just talked about, the damages before trial – or the earnings damages before trial, and add it to a figure after trial to reach a total earnings damages number, did you, sir?

A I apologize, but I honestly can't answer that question.

Q Well, since starting –

A In pretrial, post-trial –

Q Let me just ask you one thing, sir. It would be fair to say that earnings aren't in your calculations at all?

A That would depend on your definition of earnings.

Q Well, let's see if we can come to an agreement about what earnings are.

Earnings, you would agree, based on your experience, would be economic value received by CCQ. Earnings are measured net of cost; thus, lost earnings are lost receipts, less costs of goods; isn't that what earnings are?

A That would be one definition.

Q And that's not included in your report, is it?

[IV-99] A I testified previously that I had calculated damages at a gross margin number.

Q But in the real world, Mr. Ryan, you know very well that you cannot have increased sales profits of any sort without some associated costs; isn't that right?

A There might be some incremental costs, yes.

Q And you would agree with me that you have considered no costs at all associated with these figures?

A I have not allowed for any incremental or administrative costs. I believe I said that before.

Q Or costs of any sort?

A I beg your pardon?

Q Or costs of any sort, have you?

A Certainly the cost of the product has been taken into account, yes.

Q But that's it?

A I already said it's at a gross level, yes.

Q Thank you. Mr. Ryan, I want to direct you to a portion of your report. And I assume you still have it up there with you.

Did they give you the exhibits in your previous examination, as well?

A I still have my report and exhibits, yes.

Q Now counsel has previously directed your attention to the earnings figures.

[IV-100] And what I would like to do, sir, is talk with you for a second about what the many volumes of documents that you looked at have shown you about the

activities of Club Car and CCQ and EPC a little bit. And I'm going to direct your attention to what we have been talking about during the trial in your absence. And that is the sale of one year old cars.

And you looked at that issue in connection with your report and prepared an exhibit about it, didn't you, sir?

A Yes, I did.

Q And what you found was that prior to 1997 – I'm going to do a squiggly line here (indicating) to indicate what was going on after and before 1997.

And what you discovered was that prior to 1997, there were no one year old cars sent to Mr. Champigny's business; isn't that right?

A There were no documents presented to me that indicated that.

Q Okay. And you found that the first year that there were any one year cars sent into the territory and sold to Mr. Champigny's business was 1997; isn't that right?

A Either '96 or '97.

Q Let me refer you to your report. It's still before you. There is page number 52, I believe.

At least that's how I'm interpreting the designation of [IV-101] a page number.

Do you have that before you, sir?

A Just give me a second, please.

Q Absolutely.

A (Pause) According to – I don't know whether we're on the –

Q I'm on one year old sales. I want to see if I can find you an extra copy of it, just to speed this up a little bit.

It's listed on the bottom right-hand corner as page 52 exhibit to your report.

I found another copy, Mr. Ryan. This may speed us up a little bit (handing document).

A Thank you.

Q Now you prepared that document, didn't you, sir?

A Yes, I did.

Q Okay. Now what you found was that the first time the one year old cars came into the territory at all was in 1997, right?

A Yes.

Q And there was seventy of them, right?

A That's correct.

Q Seventy cars in 1997. So this loss of forty-six thousand dollars that CCQ sustained in 1996 wasn't the result of any one year old cars coming into the territory, was it?

[IV-102] A I don't know specifically what the loss was a result of.

Q But you know it couldn't have been as a result of seventy new cars coming in there because they didn't come in until 1997?

A It may have been – are we talking about the 1996 results?

Q We're talking about the 1996 result as affected by anything that happened in 1997.

And it's obvious it couldn't have had any affect?

A That's fine.

Q And you don't know how many of these seventy automobiles, if any, were even refurbished and sold by Mr. Champigny before they were sold, do you, sir? You don't know how many were refurbished before they were sold, do you?

A No, I don't.

Q You have no idea, do you?

A No, I don't.

Q In 1998, your document shows that of the one year old car sales, it was one hundred in that year, wasn't it?

A Yes, it does.

Q And you don't know whether any of those were refurbished before they were sold, do you, sir?

A No, I don't.

[IV-103] Q And then in 1999, the last full year before the contract went to Mr. Champigny, the total number of cars that went there that were one year old was two hundred and seventy-one.

And you don't know how many of those were refurbished either, do you, sir?

A No, I don't. But to be specific, in terms of the year, it's not a calendar year. I have based all my analyses on the September 30th year end.

Q I understand it's the end of the golf season there, so it can't have any effect; am I right?

A Yes.

Q Okay. So the fact of the matter is the first time you knew of any cars being one year old and refurbished was in 1999; isn't that right?

A I have no specific knowledge on any of the one year old cars, whether they were refurbished or not.

But it has been my understanding, and based on the evidence, that parts packages were provided specifically to refurbish the vehicles, not to be sold as new parts.

Q But you don't know how many of those, by your own testimony, that the parts packages actually went with the cars and how many times they didn't as to each of those years, do you, sir?

A Are you saying whether the parts were used to refurbish [IV-104] the vehicles?

Q No, sir. Whether they came with the car at all. You already told us you only estimated – your estimate was 90 percent, even though the numbers you could get ahold of showed less than 50 percent.

You don't know specifically is my point, do you?

A What my testimony was that I managed to match up parts packages for a thousand and some odd cars, and

there was a significant number – of other cars that I did not match specifically.

Q So you just assumed they went with them, didn't you?

A I made an assumption, yes.

Q Okay. And you would agree with me that the refurbished cars are a minuscule amount of the total used and new cars sold in Quebec in those years – '97, '98, and '99 – wouldn't you?

A I wouldn't leap to that conclusion without comparing the total sales for Quebec, which is a relatively small market.

Q And you would agree with me that as to the used cars, that that's a wide open market. We're talking not here about the one year old cars. But as to used cars, that's a wide open market, isn't it?

A Subject to the right of first refusal, yes.

Q That's your contention on Mr. Murphy's behalf that he [IV-105] had some first right of refusal, isn't it?

A It's my conclusion based on the evidence I examined, yes.

Q You being his advocate to advance that position, aren't you?

A I think I'm giving my independent opinions.

Q But you're giving that independent opinion not as an accountant but as someone interpreting legal documents and legal relationships, isn't that right, sir?

A Based on the evidence I reviewed, that was my conclusion.

Q That was your conclusion as a matter of law that he is entitled to a first right of refusal based on an agreement that's not written down anywhere; is that right?

A I can't be specific about whether it's a legal opinion or whether it's my opinion as a business opinion.

Q Okay. Your advocacy role extends to writing letters for your client?

A As Mr. Murphy's advisor, do I review correspondence when he asks me to. Yes, I do.

MR. PURCELL: That's all I have, Judge. Thank you.

MR. PENN: Thank you, Your Honor.

[IV-106] REDIRECT EXAMINATION

BY MR. PENN:

Q Mr. Ryan, all of these numbers that come from financial statements, every single one of these statements included the fur business, didn't they?

A To the best of my knowledge, yes.

Q In fact, was there a merger between the fur business and the golf car part of it?

A They were separate operating entities under the same corporate umbrella.

Q And what was the fur business like during this time period?

A I think it's safe to say the fur market for the last ten years has been pretty dreadful with the "environmentally friendly" and "save the animals people." That has had a significant impact on the fur business.

Q Was the fur business making money or losing money during this time period?

A Again, to the best of my knowledge, the fur business has not become profitable for a considerable period of time.

Q And, Mr. Ryan, if you would, please tell the ladies and gentlemen of the jury how these types of financial statements are put together? How are they calculated?

A I believe and the accountant's opinion says that he has prepared the financial statements from the books and records [IV-107] of the company, but he has not conducted an audit and, therefore, does not express an opinion as to the absolute accuracy of the statements, that they represent the books of the company to the best of their ability at that particular point in time.

Q What kinds of information are included in financial statements?

A Sales level costs of the gross product, administrative expenses, the salaries of the owners, the costs to run their vehicles, anything that goes along with running your own private business.

Q Would that include money that is paid to Mr. Murphy and Mrs. Murphy as salaries?

A Yes, it would.

Q Okay. And do these numbers are these the numbers that get put on tax returns?

A Yes.

Q And for purposes of the tax return, your experience, is the idea to make the number big or small?

A Small.

Q Now you were asked a little bit about the evaluation of the value of the business.

Do these financial statements that include the fur business affect your opinion as to the value of CCQ?

A No, they don't.

[IV-108] Q And are you familiar with Mr. Douglas Cates, who is the expert that's been retained by both of the other parties in this case?

A I have read his report, yes.

Q You have read his report. Are you also aware that he gave a technique for valuing a business?

A I believe it was mentioned to me that he has suggested that a multiple of cash flow is an appropriate valuation technique.

Q Do you remember what his multiple was from his testimony?

A Three to seven.

Q And based on your experience and your knowledge of CCQ, what was the cash flow of the business on a yearly bias?

A Again, looking at the cash flow, if you were transferring the operation to a similar business where the amount of the incremental administrative expenses would be minimal, I would have assessed the cash flow based on a sales volume of new vehicles and an average selling price and average gross margin.

And I would have determined that to be somewhere in the vicinity of six hundred thousand dollars a year.

Q So approximately six hundred thousand dollars a year?

A Arising from the sale of new cars.

Q Applying Mr. Cates' formula, that would give you a [IV-109] range of 1.8 million to 4.2 million?

MR. PURCELL: I'm going to object. Counsel is becoming the economist now.

THE COURT: What is your objection?

MR. PURCELL: My objection is it is a leading question and was answered in the worst possible way.

THE COURT: I will sustain it.

MR. PENN: Thank you.

BY MR. PENN:

Q You were asked a little bit about your charges. Are you charging for the time that you have put in as an accountant, as a professional, in this case and reviewing all of this information?

A Initially, when Mr. and Mrs. Murphy and I talked about my role as an expert in preparing an expert report, I

indicated to them that I really couldn't give them a hard fast number until I saw how much time was involved, but that I didn't think the fees would exceed twenty-five thousand dollars.

Subsequent to that, I think I have spent somewhere in excess of three hundred hours on this particular assignment. I have been in touch with the Murphys, and I have told them, although my actual time at my normal billing rates would far exceed the number that I intended to, and I have invoiced them in the amount of fifty thousand dollars (Canadian).

[IV-110] Q So that's your fee?

A That's my fee for the expert report, yes.

Q And you talked about – what is your typical hourly rate?

A It's somewhere between two hundred and two hundred and fifty an hour (Canadian).

Q Can you give us an estimate of how many hours you have spent on this case?

THE COURT: He just did.

THE WITNESS: I believe I said something more than three hundred hours.

MR. PENN: I apologize, Your Honor.

BY MR. PENN:

Q And this additional fee – before you testified, I believe, in deposition that it was twenty-five thousand. Now it's fifty thousand.

Does that also include travel time?

A No, it doesn't.

Q You were asked about your experience in the golf business. And I believe the question was your own experience is with CCQ.

Do you remember that question?

A Yes.

Q How long has your experience with CCQ covered? What time period?

[IV-111] A I believe it started in 1980 and has continued since then.

Q Okay. Does – to your knowledge, is there anyone who knows the financials of CCQ better than you?

A No.

Q You were asked about the exclusivity language in the contract. They put the contract up and asked you some questions related to your opinion as to whether Mr. Murphy had an exclusive distributorship or a non-exclusive distributorship.

Do you remember those questions?

A Yes, I do.

Q Does the fact that the business was an exclusive or non-exclusive distributorship change your opinion as to the numbers in this case?

A No, it doesn't.

Q Does it change your opinion as to the calculations of the numbers?

A No, it doesn't.

Q Does it change your opinion as to the value of the business?

A No, it doesn't.

Q There was also a reference to testimony about taking a shot in the dark in some of your calculations.

That was during one of your depositions?

[IV-112] A That was in my first deposition in Montreal. And it was based on my preliminary report, which was contingent on reviewing documents subsequently.

Q How many times have you been deposed in this case?

A Twice.

Q And when this "shot in the dark" comment was made, was that – did you have all the documents?

A No. At that particular point in time, we had been provided no information whatsoever on the parts packages.

Q Based on anything that you have been asked today or presented today in the form of charts or anything else, have your opinions changed?

A No.

Q You were asked about the sale of one year old cars, and it was represented to you, I think, that there were none before 1997.

Do you remember that question?

A Yes.

Q Could you tell if the documents that you received from Mr. Champigny and Club Car were complete in your review of those documents?

A There is no way, based on what was produced, that I could determine if it was complete.

Q Did Mr. Champigny produce to you any documents before 1997?

[IV-113] A Not to my knowledge.

Q And in the documents that you reviewed, were there occasions when some of the invoices from Mr. Champigny did not – were not produced by Club Car in return? Did you ever find that?

A Yes.

MR. PENN: Thank you.

MR. ELLINGTON: Your Honor, would I be permitted one recross question?

THE COURT: One.

RECROSS EXAMINATION

BY MR. ELLINGTON:

Q Mr. Ryan, have you been paid yet for your services?

A No.

MR. ELLINGTON: Thank you, Your Honor.

THE COURT: All right, Mr. Ryan, you may go down.

THE COURT: Who is next?

MR. HARRIS: We would rest at this time, Your Honor.

THE COURT: Let me ask you, Mr. Ryan: Was there any statistical data that supported the values which were ascribed to either the new or the used cars?

THE WITNESS: The statistical values that I used in my report were based on actual sales invoices and sales values.

[IV-114] THE COURT: Just on the invoices?

THE WITNESS: Yes.

THE COURT: All right. You may stand down.

You rest?

MR. HARRIS: We rest, Your Honor.

THE COURT: All right.

MR. PURCELL: Your Honor, I have a motion on this testimony. I don't mind making it now or, please the Court, whenever you tell me.

THE COURT: We will wait.

MR. PURCELL: All right, sir.

MR. HARRIS: Your Honor, can Mr. Ryan be excused?

THE COURT: Yes. Does anyone want to retain him?

MR. PURCELL: No, sir.

MR. ELLINGTON: No, sir.

THE COURT: You are excused. You want to stop the clock from running?

MR. HARRIS: Pardon?

MR. PURCELL: Shall I go now, Your Honor?

THE COURT: Yes.

MR. PURCELL: Your Honor, I have objection to the testimony and would move to strike –

MR. HARRIS: I would ask if we're going to have this motion that the jury be excused, Your Honor

THE COURT: Let's do that later. Now are you

* * *

[IV-212] duty to do precisely that.

Now under our rules of procedure, the Plaintiff in the case has the right to make an opening and a concluding argument.

All right. You may proceed, Mr. Ellington.

MR. PURCELL: Your Honor, I have a motion to make.

THE COURT: I will permit you to do that after we get through with these arguments just as if you had done it now. I do not want to take up jury time when we can take that up later.

MR. PURCELL: I understand that, Judge. But there is a motion that I have to make on the evidence, not about – it's not a Rule 50 motion. It's a motion concerning the economic testimony. And I think that the sides, the parties, are entitled to know the Court's intention with regard to that.

THE COURT: All right. Members of the jury, go to the jury room.

(Jury out at 3:47 p.m.)

THE COURT: All right. Be seated.

Mr. Purcell?

MR. PURCELL: Your Honor, as to the testimony by the accountant who testified, there is evidence only of gross profits and gross sales, There is no testimony of earnings or the effect on earnings.

[IV-213] THE COURT: What do you say to that? What is the value of his testimony when he does not take into consideration the costs?

MR. HARRIS: The way he basically calculated it was he looked [sic] the invoices, and he calculated –

THE COURT: I heard what he said.

MR. HARRIS: – the lost profits or lost part sales and the impact on the sale of new cars caused by refurbished one year olds.

The thing I want to point out –

THE COURT: Mr. Harris, he clearly said that he did not take into consideration the expenses in making his or giving his opinion as to what was lost.

MR. HARRIS: Your Honor, they had the opportunity to cross-examine him, and they had the opportunity to challenge his conclusions. I also want to point out –

THE COURT: They just did.

MR. HARRIS: – they didn't put up any counter-witness to dispute those numbers. And they tried initially to make a *Daubert* motion. And they never put up any evidence to dispute the fact that the way he calculated those numbers was improper. They make a *Daubert* motion on the day of trial. They've had –

THE COURT: That is something else. We are talking about his testimony here, where he said he did not [IV-214] take into consideration the costs and expenses in arriving at his opinion on what was lost

MR. HARRIS: Well, then he –

THE COURT: That is his only testimony.

MR. HARRIS: Then they can argue that he should have taken that into account. That does not mean that the testimony is not admissible.

THE COURT: That is sheer common sense.

MR. HARRIS: But, Your Honor –

THE COURT: They do not need testimony as to that.

MR. HARRIS: But, Your Honor, they can contend that's it's improper for him to have done that. It doesn't affect –

THE COURT: It is not improper. It just, really, denigrates the value of his opinion.

MR. HARRIS: But, Your Honor, they didn't bring a single expert witness in to sit in that chair and denigrate the value of his expert opinion. That's –

THE COURT: He did it himself.

MR. HARRIS: If it was so bad, they could have found someone to dispute it.

THE COURT: He did it himself.

MR. HARRIS: Well, Your Honor, they can challenge that conclusion. They can argue to the jury that it's improper. They can say –

[IV-215] THE COURT: That is what he is doing now.

MR. HARRIS: Well, he's welcome to argue it to the jury, and he's – he was welcome to put up contrary evidence, but he chose not to do it, and he chose to wait until the last second to dispute the testimony.

THE COURT: I am going to leave it in for whatever it is worth. But I am telling you the weakness of it.

MR. HARRIS: I understand that. I understand, Your Honor. He's more than welcome to argue. That's why we're here, to argue –

THE COURT: I thank you for that concession.

MR. PURCELL: Judge, I think under the federal rule, under the federal law, you are obligated to – you can't just let any evidence go to the jury.

MR. HARRIS: Now he's back to the *Daubert* motion.

MR. PURCELL: May I finish with my argument, Mr. Harris?

You can't let any evidence go to the jury without considering whether it's proper scientific evidence. And this is exactly –

THE COURT: That is his objection; you are giving a *Daubert* objection.

MR. PURCELL: I'm going to make that *Daubert* objection all day long. There is no time that a valid objection is time barred. There is no case that says a [IV-216] *Daubert* objection is time barred.

It is the Court's responsibility to exercise its gatekeeper function and not let testimony like that, of $10 million, without considering the amount of money that it takes to make $10 million, go to the jury. And –

THE COURT: Why not argue that point to the jury?

MR. PURCELL: Because, Your Honor, that's not my job. It's your job not to let him have it.

MR. ELLINGTON: Your Honor, I am joining in his objection.

THE COURT: I understand you are joining with everything. You do not have to say it.

MR. PURCELL: Your Honor, it's right there in the page that I gave the Court earlier on the consideration of testimony, on page 281 of the reference guide of damages in the reference manual on scientific evidence.

It's got a section on economic damages and what's in and what's out and how you compute those damages. And it's exactly how he didn't. And the jury doesn't need to be dealing with $10 million today.

MR. HARRIS: I'm not sure what –

MR. PURCELL: And it's sheer orchestrating and lawyer arguments about how it is or isn't the legitimate standard.

MR. HARRIS: I'm not sure what submission to the [IV-217] Court he's referring to.

MR. PURCELL: The one I put back there on your desk.

MR. HARRIS: This was submitted, apparently, before, and I never – I wasn't aware of that.

Your Honor, I would refer you to Rule 702. Now if the expert calculates damages based on a standard accounting way of calculating damages, then that amount is admissible. If they want to dispute –

THE COURT: He never testified to that.

MR. HARRIS: If they want to dispute that he should have deducted something, they can do that and they could have to put up a witness. Why they would wait until right now to ambush us when they could have filed a *Daubert* motion six months ago after they deposed this guy twice is beyond me. There is a way to do this.

THE COURT: Mr. Harris, you put the witness up, and he testified. Now they did not have to demonstrate that his opinion was worthless.

MR. HARRIS: Your Honor, these are good lawyers. They know how the process is done. This man was deposed twice. If they felt like his testimony was not – pursuant to 702, was not proper, they know how to file a *Daubert* motion. They know how to –

THE COURT: That may be, but I let him testify; [IV-218] did I not?

MR. HARRIS: Yes, Your Honor.

THE COURT: And he, by his own testimony, destroys the validity of it. So I am going to sustain the motion to strike his opinion as to damages.

MR. HARRIS: Well, Your Honor, then that's the equivalent of entering a directed verdict in this case.

THE COURT: Whatever it is equivalent to –

MR. HARRIS: Your Honor, if you are ruling – they have waited until the last second to bring up this issue. They don't have a witness who will contradict this man's testimony. He's an accountant. He has testified, and he knows how to calculate damages. If they think he could have deducted something from it, they can cross-examine him. They did.

If they thought it was improper, they could have put up a witness. Why they would wait until right now to do this, to ambush us, I just cannot fathom.

THE COURT: Well, he made his motion – I deferred it somewhat – at the conclusion of that witness' testimony.

MR. HARRIS: And exactly, Your Honor, if he didn't know what that witness was going to say.

THE COURT: Why else would he have done it?

MR. HARRIS: He has deposed the witness twice –

THE COURT: That does not make any difference.

[IV-219] MR. HARRIS: – and he's waited until now to do this.

MR. PURCELL: Judge, we weren't even in the case when he was deposed.

THE COURT: Nevertheless, that is my ruling.

MR. HARRIS: Well, I'm at a loss as to how we proceed, Your Honor. You have, essentially, directed a verdict on damages based on his oral *Daubert* motion and based on the fact that there hasn't been any contrary –

THE COURT: After all, you had Mr. Murphy up here testifying, did you not, about his damages?

MR. HARRIS: He didn't testify about the damages to his company.

THE COURT: I thought –

MR. HARRIS: Well, Your Honor, we put up a witness, and they had the opportunity to Daubert that witness pretrial. Is it Your Honor's –

THE COURT: Mr. Harris, you may except to the ruling, but that is my ruling.

MR. HARRIS: Is Your Honor's ruling that the verdict has been directed?

THE COURT: I did not say anything about that. You are the one that is talking about directed verdicts.

I ruled out the evidence or the testimony of the witness that demonstrates that his opinion is valueless.

[IV-220] MR. HARRIS: Well, Your Honor, there is no testimony in the record now, since you have done that, on damages. There isn't any. You have now stricken the only damages expert. And, therefore, we cannot prove – because you have stricken that damages expert, we cannot –

THE COURT: Mr. Murphy testified as to what he thought his damages were. That testimony is in the record.

MR. HARRIS: Respectfully, Your Honor, he didn't.

THE COURT: I have heard enough argument on that.

MR. HARRIS: I'm simply trying to find out how I should proceed, Your Honor. We have no evidence in the record on damages.

THE COURT: You are the lawyer. You are disregarding the testimony of your own client.

Bring in the jury.

MR. ELLINGTON: Your Honor, just for the record, before the jury comes in, we have a motion to bring before the Court under Rule 50. And I simply want it noted on the record.

THE COURT: We will take that up sometime later. I hate to keep the jury waiting.

MR. ELLINGTON: I understand. I hate to try Your Honor's patience, but could I simply ask for ten minutes at this point to gather my notes so I don't waste the jury's time in this closing argument?

[IV-221] THE COURT: All right. I think Mr. Harris would appreciate that, too. Go ahead. Ten minutes. Well, get to it.

MR. ELLINGTON: If you want to give me fifteen, I'll take it.

THE COURT: No, ten is enough.

(Recess at 3:55 p.m. until 4:08 p.m.; jury present)

MR. HARRIS: Your Honor, I have one short matter I need to get clarification on about the prior order, if we can approach and do that?

(At sidebar on the record)

MR. HARRIS: As I understand what the Court has ruled on, it has – ruled out the testimony, pursuant to Mr. Purcell's objections, on what would be item seven, lost sales.

MR. PURCELL: Judge, it's everything.

THE COURT: No, not everything. He gave some testimony regarding the value of the business.

MR. PURCELL: Did he do that?

THE COURT: They are entitled to that. And the fact that Mrs. Murphy said they lost business, there was some evidence as to that.

MR. HARRIS: One other thing, about the margins –

THE COURT: I am going to let it stand.

MR. PENN: If I may say something? This is the [IV-222] first time we have seen this document, and I want to let you know and put it on the record that this was misrepresented by Mr. Purcell. It does not say what he says it did. It's from a reference guide.

THE COURT: I cannot help that. I have not read it.

MR. ELLINGTON: Your Honor, I have a question. I simply need to ask, are you going to instruct the jury regarding Mr. Ryan's testimony before I begin?

THE COURT: Before you begin, yes, I guess so.

(End of discussion at sidebar)

THE COURT: Members of the jury, with respect to Mr. Ryan's testimony as to damages, when he says that he did not take into consideration the expenses involved and merely used the gross amount, his opinion as to the loss on the Defendant's counterclaim is stricken. You are not to consider that.

Go ahead.

MR. ELLINGTON: Thank you, Your Honor. Members of the jury, we appreciate on behalf of Club Car the attention that you have paid to this case this week. We understand that jury duty is an imposition of your time, and we appreciate your attentiveness and willingness to listen to all of us this week present our case.

On Monday, when I stood before you, I explained

* * *

[IV-239] MR. HARRIS: May it please the Court, ladies and gentlemen of the jury, I think one thing we can all agree on is this is a lot more than a simple collection case.

There are two claims that Club Car (Quebec) has brought in this case. There are two sets of claims. And the claims really have a dividing line in the year 2000.

There are a series of events that occur before the year 2000, and there are a series of events that occur after 2000. Now I want to begin with talking to you about what was occurring before the year 2000.

The evidence you have heard has made it abundantly clear to you that, beginning around 1996, Martin Murphy began to make a lot of noise about what was happening to him. He began to say over and over and over again to Club Car, "Where are all these parts coming from? Why are you setting someone up to compete with me? What is happening here?"

And over and over again, Club Car said to him, "We don't know what you're talking about."

Now ask yourself one simple question. If there was nothing wrong with what they were doing, as Mr. Ellington has alluded to, if there was nothing wrong with what they were up to, why was everybody so secretive about it?

Why, when Mr. Murphy said, "Where are the parts

* * *

Certificate of Service

9/27/2004

Herewith are 40 of the paperbooks

No.

In the

Supreme Court of the United States

CLUB CAR (QUEBEC) IMPORT, INC.,
MARTIN MURPHY, PETITIONERS

v.

CLUB CAR, INC.,

AND

PIERRE CHAMPIGNY, EQUIPMENTS PIERRE CHAMPIGNY, LTD.,

I hereby certify that I am this day serving the foregoing document (3) copies upon the person(s) and in the manner indicated below. All parties to be served have been served. Service by first-class mail addressed as follows:

Amy R. Snell
Fulcher, Hagler, Reed, et al
520 GREENE ST
AUGUSTA, GA 30901-1404

James B. Ellington
Hull, Towill, Norman
& Barrett
P. O. Box 1564
801 Broad St., 7th Floor
Augusta, GA 30903-1564

Respectfully Submitted,

/s/ Rod Curry
ROD CURRY
SUITE 124
1330 NEW HAMPSHIRE AVENUE
WASHINGTON, DC 20036
202-223-3160

Curry & Taylor
1330 New Hampshire Avenue
Suite 124
Washington, DC 20036

James B. Ellington
Hull, Towill, Norman & Barrett
P. O. Box 1564
801 Broad St., 7th Floor
Augusta, GA 30903-1564